SUPREME COURT OF WISCONSIN

KARL A. BURG, by his
legal guardian,
GLADYS M. WEICHERT,

Plaintiff-Appellant,

Case No.: 00-3258

-v-

CINCINNATI CASUALTY/ INSURANCE
COMPANY and ROBERT W. ZIMMERMAN,

Defendants-Respondents-Petitioners.

Appeal From a Judgment Entered 11/9/00 by the Milwaukee
County Circuit Court-
The Honorable Michael Malmstadt
Case No: 98-CV-008875

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS-PETITIONERS, CINCINNATI INSURANCE COMPANY AND ROBERT W. ZIMMERMAN

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STATEMENT OF ISSUE PRESENTED ON APPEAL

I. Was Robert W. Zimmerman negligent per se for violating §350.09(1), Stats., which requires that "Any snowmobile operated during the hours of darkness . . . shall display a lighted head lamp and tail lamp?" Central to that question is the determination of whether sitting on a snowmobile, at night, with the motor, and therefore, the headlights and taillights off, constitutes "operating" that snowmobile under the definition of "operate" found in §350.01(9r), Stats., requiring "the exercise of physical control over the speed or direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion."

ANSWERED BY THE TRIAL COURT: NO

ANSWERED BY THE COURT OF APPEALS: YES

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary for this appeal. The determination of this appeal involves the application of statutory language and established caselaw to undisputed facts. It is anticipated that the parties' briefs will fully present the applicable issues and legal authority. Oral argument is, therefore, unnecessary and would not

justify the additional expenditure of this Court's time or the increased cost to the petitioners in this matter.

Publication of this Court's opinion arising from this appeal is both proper and necessary. In a published opinion, the court of appeals relied on the *Proegler* and *Modory* decisions to expand the definition of "operate" pursuant to §350.01 (9r), Stats., to include situations where the motor was not running, the key was in the "off" position and the owner was simply sitting on the snowmobile, talking. Publication of this Court's opinion arising from this appeal will conclusively establish what constitutes "operation" under the statutory definition, thereby decreasing the opportunity for confusion and future litigation.

STATEMENT OF THE CASE

This lawsuit involves personal injuries alleged as a result of a snowmobile accident occurring on November 29, 1995, in Racine County, Wisconsin. The court of appeals, in a published decision, reversed the trial court's ruling that the defendant Robert Zimmerman was not "operating" his snowmobile pursuant to §350.09(1), Stats., and therefore, was not negligent per se.

A. Statement of Facts

The facts surrounding the above-mentioned accident are not in dispute. The plaintiff, Karl Burg, and Robert Dros were operating snowmobiles on a 40-45 foot wide, flat and level gravel bed parallel to STH 36 in Racine County. (Record 62, pps. 137, 142-43; Petitioners' Appendix pp. 37-38, 43-44). It was approximately 5:30 p.m. and it was dark. (R. 62, at 142; P-App p. 43). The gravel bed was to become additional lanes of STH 36 and was not yet open to vehicular traffic. (R. 62, at 137; P-App p. 38) It is undisputed that this accident did not occur on an established snowmobile trial.

The defendant, Robert W. Zimmerman, and a companion, Dean Leighton, were also snowmobiling on the gravel bed parallel to STH 36. (R. 63, at 172-73; P-App pp. 48-49) The two stopped their snowmobiles and shut off their motors in order to talk. (R. 63, at 173; P-App p. 49) By shutting off their motors, Zimmerman and Leighton extinguished their head lamps and tail lamps. (Id.) Undisputed evidence offered at trial established that in order to restart the motor, thereby turning on the head and tail lamps, it was necessary for Zimmerman to turn the key to the "on" position and pull a rope. (R. 63, at 174; P-App p. 50) It was not possible for Zimmerman to illuminate

his head and tail lamps without first starting his motor. (R. 63, at 174-75; P-App pp. 50-51)

Burg and Dros were traveling southbound on the gravel bed parallel to STH 36 at 35-40 miles per hour. (R. 62, at 139-40; P-App pp. 40-41) Dros followed 100-110 feet behind Burg as they approached the location where Zimmerman and Leighton were parked. (R. 62, at 141; P-App p. 42) Burg, apparently failing to see Zimmerman and Leighton, swerved to avoid Zimmerman and struck Leighton. (R. 62, at 141-43; R. 63 at 175-76; P-App pp. 42-44, 51-52) Testimony established that Zimmerman and Leighton were stopped for five minutes before Burg struck Leighton. (R. 63, at 175; P-App p. 51)

Even though Zimmerman's and Leighton's snowmobile motors were not running and their tail lamps were not illuminated, their tail lamps contained retro-reflectors designed to reflect light from other sources. (R. 62, at 217; P-App p. 45) Dennis Skogen, an accident reconstructionist called by the defense, testified that he performed an experiment using Zimmerman's snowmobile and exemplars of the snowmobile used by Burg and Leighton. (R. 63, at 220-21; P-App pp. 54-55) Skogen testified that he was able to see Zimmerman's retro-reflector at a distance of 330 feet. (R. 63, at 220; P-App p. 54) Skogen also

testified that he was able to see the snowmobiles themselves at 200-250 feet. (R. 63, at 221; P-App p. 55) The plaintiff's liability expert, Richard Hermance, testified that a person should be able to see a retro-reflector at a distance of 400 feet. (R. 62 at 217; P-App p. 45)

Skogen testified that a snowmobile similar to Burg's, operated at 40 miles per hour, could be stopped in a distance of 156-177 feet. (R. 63 at 213; P-App p. 53) Skogen also testified that his recommended safe speed, considering the conditions at the time of this accident, would be 30 miles per hour. (R. 63 at 223; P-App p. 56) He also testified that he would recommend wearing a visor because tearing of the eyes as a result of wind blowing in the operator's face would detract from that operator's vision. (R. 63 at 223-24; P-App pp. 56-57) Although Burg was wearing a helmet, which came off upon impact, no visor was found. (R. 62 at 234; P-App p. 46)

B. Procedural History

Burg filed this lawsuit against Zimmerman and Cincinnati Insurance Company, his insurer, alleging negligence. Burg moved the trial court for an order finding Zimmerman negligent per se under §350.09(1), Stats., on the basis that Zimmerman failed to display a

lighted tail lamp while operating a snowmobile during hours of darkness. (R. 61 at 2; P-App p. 18) The trial court denied this motion, ruling that Zimmerman was not operating his snowmobile at the time of this accident. (R. 61 at 7-9; P-App pp. 23-25)

During trial, the trial court again ruled that Zimmerman was not operating his snowmobile, as that term is defined in §350.01(9r), Stats. (R. 64 at 137-39; P-App pp. 28-30) After a jury verdict finding that Burg was solely responsible for his own injuries, Burg moved the trial court for a new trial on the basis that Zimmerman was negligent per se. (R. 52 at 1; P-App p. 32) In denying that motion, the trial court held that Zimmerman was merely sitting on a snowmobile and was not engaged in any physical control over the speed and direction of a snowmobile, nor was Zimmerman manipulating or activating any of the controls necessary to put it in motion. (R. 52 at 1-4; P-App pp. 32-35) In the trial court's view, Mr. Zimmerman was not operating a snowmobile under the definition found in §350.01(9r), Stats. (Id.)

In a published opinion, a majority of the court of appeals held that Mr. Zimmerman's actions in sitting on a snowmobile, at night, with a non-running motor and the key in the "off" position, constituted operation under the

statute. *Burg v. Zimmerman*, 2001 WI App 241, ¶9, 635 N.W.2d 622 (Ct. App. 2001). Zimmerman was therefore negligent per se and the court of appeals ordered a new trial on liability and damages. *Burg*, at ¶15.

In a dissenting opinion, Judge Curley disagreed, stating that the majority's interpretation had no logical stopping point. *Burg*, at ¶21. Judge Curley opined that the majority opinion misinterprets the *Proegler* and *Modory* decisions, and a correct interpretation of those decisions shows that Mr. Zimmerman was not "operating" under the statutory definition. *Burg*, at ¶22.

Zimmerman and Cincinnati Insurance petitioned this Court for review of the court of appeals' decision, which was subsequently granted. Filing this Brief, these petitioners respectfully request that this Court reverse the court of appeals and find that Robert Zimmerman was not "operating" his snowmobile under §350.01 (9r), Stats., and therefore was not negligent per se for violating §350.09(1), Stats.

ARGUMENT

I. ROBERT ZIMMERMAN WAS NOT "OPERATING" HIS SNOWMOBILE AS THAT TERM IS DEFINED IN §350.01(9r), STATS. AND WAS THEREFORE NOT NEGLIGENT PER SE.

The court of appeals' published majority opinion held that Robert Zimmerman was "operating" his snowmobile as

that term is defined in §350.01(9r), Stats., at the time of this accident. *Burg*, at ¶8. The majority opinion held that Mr. Zimmerman was negligent per se for violating §350.09(1), Stats., reversing the trial court's ruling to the contrary. *Burg*, at ¶1.

The application of a statute to undisputed facts is a question of law which the Wisconsin Supreme Court determines without deference to the decisions of the trial court and court of appeals. *Ball v. District No. 4 Area Board*, 117 Wis.2d 529, 537, 345 N.W.2d 389 (1984), *citing*, *First Nat. Leasing Corp. v. Madison*, 81 Wis.2d 205, 208 260 N.W.2d 251 (1977).

Sec. 350.09(1), Stats., provides in part, "Any snowmobile operated during the hours of darkness . . . shall display a lighted head lamp and tail lamp." Wis. Stat. §350.09(1)(1999). "Operate" is defined as "the exercise of physical control over the speed and direction of a snowmobile or the physical manipulation or activation of any controls necessary to put it in motion." Wis. Stat. §350.01(9r)(1999). The application of the undisputed facts in this case to this statutory definition clearly shows that Robert Zimmerman was not "operating" his snowmobile at the time of this accident. Likewise, the application of these facts to the *Proegler* and *Modory* decisions, relied on

by the court of appeals to overturn the trial court, also shows that Zimmerman was not operating his snowmobile. Because Zimmerman was not operating his snowmobile at the time of this accident, he was not negligent per se for violating §350.09(1), Stats. and the court of appeals' decision is properly reversed.

A. Statutory Definition

In construing a statute, the primary source utilized is the language of the statute itself. *Wis. Environmental Decade v. Public Service Comm.*, 81 Wis.2d 344, 350, 260 N.W.2d 712 (1978), *citing*, *Nekoosa-Edwards Paper Co. v. Public Service Comm.*, 8 Wis.2d 582, 591, 99 N.W.2d 821 (1959). When a word or phrase is specifically defined in a statute, its meaning is as defined in the statute and no other rule of statutory construction need be applied. *Beard v. Lee Enterprises, Inc.*, 225 Wis.2d 1, 23, 591 N.W.2d 156 (1999), *citing*, *Fredericks v. Industrial Comm'n*, 4 Wis.2d 519, 522, 91 N.W.2d 93 (1958).

In order to be deemed "operating" his snowmobile, Zimmerman must have been: 1) exercising physical control over the speed or direction of the snowmobile or 2) physically manipulating or activating controls necessary to put the snowmobile in motion. Wis. Stat. §350.01(9r)

(1999). The evidence upon the record shows that, at the time of this accident, Zimmerman was doing neither.

At the time Karl Burg struck Dean Leighton's snowmobile, Robert Zimmerman was doing nothing more than sitting on a snowmobile in the dark, conversing. The undisputed evidence shows that the motor was turned off and the key was in the "off" position. Zimmerman was not exercising physical control over the speed or direction of the snowmobile because his snowmobile was stopped and incapable of movement. Zimmerman and Leighton were stopped for five minutes before this accident occurred.

In order to move the snowmobile, Zimmerman had to turn the key to the "on" position and pull a rope to fire the motor. Sitting on a snowmobile in the dark, with the key in the "off" position does not constitute the exercise of physical control over the speed or direction of the snowmobile. Zimmerman was not activating or manipulating the snowmobile's controls. By the statutory definition he was not "operating" his snowmobile at the time of this accident and was therefore not negligent per se.

The court of appeals determined that Zimmerman was exercising physical control over the speed and direction of this snowmobile because "Operate, therefore, necessarily encompasses a person's actions in stopping a snowmobile and

turning off its motor . . . The fact that such actions stop the snowmobile certainly renders those actions no less controlling of speed and direction than other actions that accelerate the snowmobile or change its course." *Burg*, at ¶10. As Judge Curley's dissent recognizes, the majority opinion makes it appear as if this accident occurred while Zimmerman was in the process of stopping his snowmobile. *Burg*, at ¶20. The evidence shows that this is not the case, considering Zimmerman and Leighton were stopped for five minutes before this accident.

The court of appeals also held that Zimmerman's actions in turning off the motor constituted physical manipulation of the controls necessary to put it in motion, "The fact that the manipulation stopped the snowmobile certainly renders that action no less a manipulation of the controls necessary to put the snowmobile in motion." *Burg*, at ¶11. This holding disregards the fact that Zimmerman turned off his motor some five minutes prior to this accident.

A fundamental rule of statutory construction requires that effect be given to every word, clause and sentence in a statute, and that a construction resulting in any portion of a statute being superfluous should be avoided. *Blazekovic v. City of Milwaukee*, 2000 WI 41, ¶30, 234

Wis.2d 587, 601, 610 N.W.2d 467 (2000), *citing, Lake City Corp. v. City of Mequon*, 207 Wis.2d 155, 162, 558 N.W.2d 100 (1997).

Sec. 350.01(9r), Stats., provides, "'Operate' means the ***exercise*** of physical control over the speed and direction of a snowmobile. . . ." Wis. Stat. §350.01(9r)(1999)(Emphasis supplied). The inclusion of the term "exercise" in the statutory definition must be considered and its meaning shows that Robert Zimmerman was not operating his snowmobile at the time of this accident.

Webster's Collegiate dictionary defines "exercise" as "to make effective in action." *Merriam Webster's Collegiate Dictionary* 406 (10th ed. 1996). The inclusion of "exercise" in the statutory definition of "operate" suggests that in order to satisfy the definition, one must take some affirmative action to control the speed or direction of a snowmobile. At the time of this accident, Robert Zimmerman was taking no affirmative action to control the speed or direction of his snowmobile and therefore, was not "operating" said snowmobile.

In construing a statute, courts must avoid any construction which would lead to absurd and unreasonable results. *Jelinek v. St. Paul Fire and Casualty Ins. Co.*, 182 Wis.2d 1, 512 N.W.2d 764, 768 (1994), *citing, Estate of*

Evans, 28 Wis.2d 97, 101, 135 N.W.2d 832 (1965). Finding that Robert Zimmerman's actions in sitting on a snowmobile with the motor off and the key in the "off" position, conversing, falls within the "exercise of physical control over the speed and direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion" is an unreasonable result.

The unreasonableness of the determination that the facts at hand fall within the ambit of §350.01(9r), Stats., is evident, considering the court of appeals' definition offers no logical stopping point. As Judge Curley questions:

> How much time need expire for someone seated on the snowmobile, after turning off the ignition and leaving the keys in the ignition, in order to no longer be "operating the snowmobile? Is a person operating a snowmobile if he turns off the snowmobile and removes the keys, but remains seated on the snowmobile? What if someone stops the snowmobile, leaves the keys in the ignition, walks away from the snowmobile but returns and sits on it- is he still operating the snowmobile . . . Clearly, the majority's attempt to reshape Zimmerman's conduct so as to fit within the definition of "operate" in order find Zimmerman negligent is misguided and fraught with problems.
>
> *Burg*, at ¶21.

The majority's published opinion expands and clouds the statutory definition of "operate." As a

result, future litigation involving this issue is a certainty. The terms of the statute dictate that sitting on a snowmobile with the motor not running, with the key in the "off" position, is not "operating." Robert Zimmerman was therefore, not operating and not negligent per se and the court of appeals' decision is properly reversed.

B. Proegler and Modory Decisions

In overturning the trial court, the court of appeals relied on *County of Milwaukee v. Proegler*, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980) and *State v. Modory*, 204 Wis.2d 538, 555 N.W.2d 399 (Ct. App. 1996). These decisions do not support the majority's interpretation, but rather illustrate that Robert Zimmerman was not operating his snowmobile at the time of this accident.

Proegler involved an intoxicated defendant found sleeping behind the wheel of his automobile. *Proegler*, 95 Wis.2d at 618. The keys were in the ignition, the motor was running and the automobile was in "park." *Id.* The defendant was charged with operating while intoxicated. The court recognized that the statute prohibited either "driving" or "operating" while intoxicated. *Proegler*, 95 Wis.2d at 625. The court examined §346.63(3), Stats., defining "drive" as the "exercise of physical control over

the speed and direction of a motor vehicle while it is in motion" and "operate" as the "physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." *Id.* The court specifically held, "This court is of the opinion that the defendant's conduct falls within the definition of 'operate' and that the trial court's finding was not against the great weight and clear preponderance of the evidence." *Id.* The court further held:

> The language of sec. 346.63(3), Stats., is clear. The prohibition against the 'activation of any of the controls of a motor vehicle necessary to put it in motion' applies either to turning on the ignition or leaving the motor running while the vehicle is in 'park.' One who enters a vehicle while intoxicated, and does nothing more than start the engine is as much of a threat to himself and the public as one who actually drives while intoxicated.
>
> *Proegler*, 95 Wis.2d at 626.

The *Proegler* court specifically held, "'Operation' of a vehicle occurs either when a defendant starts the motor and/or leaves it running." *Id.* at 628-29. Obviously, a running motor requires physical manipulation or activation of the controls necessary to put the vehicle in motion.

The *Proegler* court discussed cases from Arizona and Montana interpreting "actual physical control." *See Proegler*, 95 Wis.2d at 627, *citing*, *State v. Webb*, 78 Ariz.

8, 274 P.2d 338, 340 (1954) and *State v. Ruona*, 133 Mont. 243, 321 P.2d 615, 618 (1958). At issue in both of those cases was whether motion was necessary in order to find "actual physical control." Both of those cases involved automobiles with running motors. The *Proegler* court held, "We feel that their reasoning is applicable to a similar interpretation of the term "operate," and hold that restraining the movement of a ***running*** vehicle constitutes manipulation of a vehicle's controls which falls within the scope of our statute." *Proegler*, 95 Wis.2d at 627-28 (emphasis supplied). Their reasoning is made applicable by the existence of a running motor. A running motor requires the manipulation or activation of the controls necessary to put the vehicle in motion, thereby falling within the ambit of Wisconsin's statutory definition of "operate."

The majority opinion loses sight of the specific holding in *Proegler* and instead focuses on the notion of "actual physical control." The majority held, "Indeed, a drunk driver, sleeping in a parked car with the motor running, has less physical control over that vehicle than a snowmobile operator, sitting awake at the controls of a parked snowmobile with the motor off." *Burg*, at ¶12. *Proegler* did not involve "actual physical control," but rather was decided on the determination that because the

defendant's motor was running, he activated or manipulated controls necessary to put the vehicle in motion. Robert Zimmerman was not activating or manipulating the controls of his snowmobile, and was, therefore, not operating that snowmobile.

The *Modory* decision, likewise, fails to support the court of appeals' majority opinion. In *Modory*, the defendant was charged with operating while intoxicated after attempting to move his truck, which was stuck on a dirt pile. *Modory*, 555 N.W.2d at 399. The defendant in *Modory* unsuccessfully argued that because his vehicle was immobile he was not operating it. *Modory*, 555 N.W.2d at 400. The *Modory* court adopted the court's ruling in *Proegler*, holding, "The statute only requires that the defendant physically manipulate or activate any of the controls 'necessary to put [the motor vehicle] in motion.'" *Modory*, 555 N.W.2d at 401, *citing*, *Proegler*, *supra*. The court further recognized, "There is little doubt from the evidence in this case that Modory performed the requisite acts under this statute. He was behind the wheel of a vehicle with the engine running and was attempting to free the vehicle from its stuck position." *Id.*

In *Proegler* and *Modory*, the running motor was evidence that the defendant was activating or manipulating controls necessary to put the vehicle in motion.

In the present case, Robert Zimmerman was sitting on his snowmobile with the motor turned off and key in the "off" position, conversing. He was not manipulating or activating any controls of his snowmobile, nor was he exercising physical control over the speed or direction of his snowmobile. Under the holdings in *Proegler* and *Modory*, Zimmerman was therefore, not operating that snowmobile, and was not negligent per se. The court of appeals' reliance on *Proegler* and *Modory* in order to expand the statutory definition of "operate" confuses the clear holding in these cases. Accordingly, the court of appeals' opinion holding the opposite is properly reversed.

CONCLUSION

Sec. 350.09(1), Stats., requires that snowmobiles operated at night display lighted head and tail lamps. In order to deemed "operating" a snowmobile, a person must either exercise physical control over the speed and direction of a snowmobile or activate or manipulate any of the controls necessary to put that snowmobile in motion, pursuant to §350.01(9r), Stats.

The evidence upon the record in this case shows that at the time Karl Burg struck Dean Leighton, Robert Zimmerman was sitting on his snowmobile, his motor shut off, key in the "off" position, conversing with his friend. Zimmerman was not exercising physical control over the speed or direction of his snowmobile because it was impossible for him to do so. Further, Zimmerman was not activating or manipulating the controls necessary to put the snowmobile in motion. The court of appeals' majority decision, expanding the definition to encompass these activities, is in derogation of this statutory definition. Further, the majority's reliance on the *Proegler* and *Modory* decisions in expanding the definition of "operate" under the statute, is incorrect. Those decisions show that Robert Zimmerman was not "operating" his snowmobile at the time of this accident and was not negligent per se. Allowing the court of appeals' published decision to stand confuses the statutory definition as well as the holdings in *Proegler* and *Modory*, and will lead to certain future litigation. Based on the above, the petitioners, Robert Zimmerman and the Cincinnati Insurance Company, respectfully request that this Court find that Robert Zimmerman was not operating his snowmobile at the time of

this accident and was not negligent per se, thereby reversing the court of appeals.

Dated: Dec 26th, 2001

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APPENDIX AND TABLE OF CONTENTS

FORM AND LENGTH CERTIFICATION

I certify that this Brief conforms to the rules contained in sec. 809.19(8)(b) and 809.62(4), Stats., for a brief produced using the following font:

Monospaced Font: 10 characters per inch; double spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this Brief is 23 pages, not including the materials contained in the index.

Dated: December 26, 2001

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COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 00-3258

†Petition for Review filed.

Complete Title of Case:

KARL A. BURG BY HIS LEGAL GUARDIAN,
GLADYS M. WEICHERT,

PLAINTIFF-APPELLANT,

V.

CINCINNATI CASUALTY INSURANCE CO.
AND ROBERT W. ZIMMERMAN,

DEFENDANTS-RESPONDENTS.†

Opinion Filed:	September 11, 2001
Submitted on Briefs:	July 6, 2001

JUDGES:	Wedemeyer, P.J., Schudson and Curley, JJ.
Dissented:	Curley, J.

Appellant ATTORNEYS:	On behalf of the plaintiff-appellant, the cause was submitted on the briefs of *Victor C. Harding* of *Warshafsky, Rotter, Tarnoff, Reinhardt & Bloch, S.C.*, of Milwaukee.
Respondent ATTORNEYS:	On behalf of the defendants-respondents, the cause was submitted on the brief of *Gregory J. Cook* of *Kasdorf, Lewis & Swietlik, S.C.*, of Milwaukee.

COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

2001 WI App 241

No. 00-3258

STATE OF WISCONSIN **IN COURT OF APPEALS**

KARL A. BURG BY HIS LEGAL GUARDIAN, GLADYS M. WEICHERT,

PLAINTIFF-APPELLANT,

V.

CINCINNATI CASUALTY INSURANCE CO. AND ROBERT W. ZIMMERMAN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Reversed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 SCHUDSON, J. Karl A. Burg, by his legal guardian, Gladys M. Weichert, appeals from the judgment, following a jury trial, dismissing his action against Robert W. Zimmerman and Zimmerman's insurer, Cincinnati Casualty

Insurance Co.[1] Burg argues that the trial court erred in concluding that Zimmerman's conduct in the operation of a snowmobile was not negligent per se, and that the jury's damages verdict was perverse. Burg is correct and, therefore, we reverse.

I. BACKGROUND

¶2 The facts relevant to resolution of the issues on appeal are not in dispute. According to the trial testimony, at approximately 5:30 P.M. on November 29, 1995, about one hour after sunset, Burg and a friend were snowmobiling on two snow-covered gravel lanes, parallel to Highway 36 in Racine County. The two lanes, under construction and not yet open to automobile traffic, were to become additional lanes of the highway. Zimmerman and a friend, Dean Leighton, were also snowmobiling on the same lanes when they stopped, turned off their motors, and were talking; their snowmobiles, snowmobile suits, and helmets were black. The head lamps and tail lamps of Zimmerman's and Leighton's snowmobiles automatically went out when Zimmerman and Leighton turned off their motors.

¶3 Burg and his friend, approaching the location where Zimmerman and Leighton had stopped, did not see them until it was too late. Burg swerved, apparently to avoid Zimmerman's snowmobile, and struck Leighton's snowmobile.[2] Burg was thrown approximately forty feet and sustained brain

[1] The appeal also brings before this court the trial court order denying Burg's postverdict motion for a new trial. *See* WIS. STAT. RULE 809.10(4) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] None of the issues in this appeal, however, turns on the fact that Burg struck Leighton's snowmobile, not Zimmerman's.

injury, resulting in a coma and the need for prolonged hospitalization and rehabilitation. He has permanent residual physical and cognitive impairments.

¶4 Burg sued Zimmerman and his insurer, alleging negligence. In pretrial proceedings, Burg moved for an order declaring that Zimmerman was negligent per se under WIS. STAT. § 350.09(1), which, in relevant part, provides: "Any snowmobile operated during the hours of darkness ... shall display a lighted head lamp and tail lamp."[3] Denying Burg's motion, the trial court ruled, as a matter of law, that Zimmerman had not been "operating" his snowmobile at the time of the accident.

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[3] It was undisputed that Zimmerman's and Leighton's snowmobiles had neither their head lamps nor tail lamps illuminated at the time of the accident. WISCONSIN STAT. § 350.09(2) provides:

> After February 12, 1970, the head lamp on a snowmobile may be of the single beam or multiple beam type, but in either case shall comply with the following requirements and limitations:
>
> (a) The head lamp shall be an electric head lamp and the current shall be supplied by a wet battery and electric generator, by a current-generating coil incorporated into the magneto or by a generator driven directly by the motor by means of gears, friction wheel, chain or belt.
>
> (b) The head lamp shall display a white light of sufficient illuminating power to reveal any person, vehicle or substantial object at a distance of 200 feet ahead.
>
> (c) If the snowmobile is equipped with a multiple beam head lamp, the upper beam shall meet the minimum requirements set forth in par. (b) and the lower most beam shall be so aimed and of sufficient intensity to reveal persons and vehicles at a distance of at least 100 feet ahead.
>
> (d) If the snowmobile is equipped with a single beam lamp, such lamp shall be so aimed that when the vehicle is loaded none of the high intensity portion of the light, at a distance of 25 feet ahead, projects higher than the level of the center of the lamp from which it comes.

Section 350.09(3) provides, "After February 12, 1970, the tail lamp on a snowmobile must display a red light plainly visible during darkness from a distance of 500 feet to the rear."

¶5 During the course of the trial, Burg's attorney suggested that "maybe the Court has made an incorrect ruling up to this point, and maybe the Court can correct its ruling." The trial court, having concluded that because the motor was not on, Zimmerman was not "operating" his snowmobile at the time of the accident, responded that "it's been pretty much a consistent ruling when [snowmobiles are] parked, they're not being operated based upon the definition of the word 'operate' in the statutes of this state."[4] The trial court, however, commented:

> I think the law is stupid, but I'm stuck with what the law is.
>
> You know, I think when two people park their snowmobile[s] out there and are sitting around talking about what route they're going to take, it's hard for me to comprehend how the law can say that's not operating, but it does.

¶6 After the jury retired for deliberation, Burg, relying on WIS. STAT. §§ 350.09(1)-(3) and 346.51,[5] renewed his motion that the court find Zimmerman

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[4] "'Operate' means the exercise of physical control over the speed or direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion." WIS. STAT. § 350.01(9r).

[5] WISCONSIN STAT. § 346.51, in relevant part, provides:

> **(1)** No person shall park, stop or leave standing any vehicle, whether attended or unattended, *upon the roadway* of any highway* ... when it is practical to park, stop or leave such vehicle standing off the roadway, but even the parking, stopping or standing of a vehicle off the roadway of such highway is unlawful unless the following requirements are met:
>
> ....
>
> (b) Such standing vehicle must be capable of being seen by operators of other vehicles from a distance of 500 feet in each direction along such highway.

(Emphasis and asterisk added.) Under WIS. STAT. § 346.02(10), § 346.51 is applicable to operators of snowmobiles upon roadways.

*WISCONSIN STAT. § 340.01(54) states, in relevant part, "'Roadway' means that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm or shoulder."

negligent per se. The trial court replied: "I think the record's clear on that. The motion is denied."[6]

¶7 The jury found neither Zimmerman nor Leighton negligent "with respect to the use" of their snowmobiles. Burg moved for a new trial, again contending that Zimmerman was negligent per se, and also arguing that the jury's determination of damages was "perversely low." The trial court denied his motion, stating that "[t]here is nothing in this definition [of 'operate' under WIS. STAT. § 350.01(9r)] that supports [Burg's] claim." The court reasoned, "Here the facts show ... that the defendant was merely sitting on a snowmobile that was not turned on, and that he was not engaged in any physical manipulation or activation of the snowmobile's controls."

II. DISCUSSION

A. Negligence Per Se

¶8 We agree that if, as the trial court concluded, turning off one's snowmobile motor and sitting on the snowmobile on a snowmobile lane in the dark did not constitute "operating," the law would be "stupid." We conclude, however, that the statutes, literally read and reasonably applied, establish that such conduct does indeed constitute "operating" a snowmobile.

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[6] Earlier in the trial, outside the presence of the jury, the court had explained why it believed that WIS. STAT. § 346.51 did not apply to the case:

> This isn't designed to protect snowmobiles from driving 55 feet off the highway. It's designed to protect vehicles that are traveling on the roadway.
>
> It requires that ... the vehicle when stopped off the roadway is visible 500 feet back for the protection of people who are using the roadway, not for the protection of the people who are using the land adjacent to the roadway some 55 feet off the roadway.

¶9 The interpretation of a statute presents a question of law subject to this court's *de novo* review. ***Gloudeman v. City of St. Francis***, 143 Wis. 2d 780, 784, 422 N.W.2d 864 (Ct. App. 1988). "In construing a statute, the primary source is the language of the statute itself." ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 625, 291 N.W.2d 608 (Ct. App. 1980). Interpreting the language of the statute, we endeavor to give the words their commonsense meanings and to avoid any interpretation that would produce an absurd result. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 449, 405 N.W.2d 354 (Ct. App. 1987). We conclude that "operate," under WIS. STAT. § 350.01(9r), is clear and unambiguous, *see* ***Proegler***, 95 Wis. 2d at 624-29 (concluding that the meaning of "operate," under WIS. STAT. § 346.63(3), is clear), and that it does encompass Zimmerman's conduct in this case.

¶10 "Operate," under WIS. STAT. § 350.01(9r), includes "the exercise of physical control over the speed or direction of a snowmobile." "Operate," therefore, necessarily encompasses a person's actions in stopping a snowmobile and turning off its motor because, literally, such actions do "exercise physical control over the speed and direction" of the snowmobile. The fact that such actions *stop* the snowmobile certainly renders those actions no less controlling of speed and direction than other actions that accelerate the snowmobile or change its course.

¶11 Further, under the statute, turning off the motor certainly, and quite literally, involves "the physical manipulation ... of the controls of a snowmobile necessary to put it in motion." The fact that the manipulation *stopped* the snowmobile's motion certainly renders that action no less a manipulation of the controls necessary to put the snowmobile in motion. Indeed, in ***Proegler***, this

court, in determining the meaning of "operate" under WIS. STAT. § 346.63(3)(b),[7] held that "restraining the movement of a running vehicle constitutes physical manipulation of a vehicle's controls which falls within the scope of our statute." ***Proegler***, 95 Wis. 2d at 627-28. Obviously, turning off a snowmobile's motor is a "physical manipulation" of the controls, causing a "restraining [of] the movement" of the snowmobile.

¶12 Moreover, while ***Proegler*** involved a drunk driver sleeping in his car with the motor running, ***id.*** at 624, this court's comments now gain special significance in the context of the instant case:

> "[O]ne could have 'actual physical control' while merely parking or standing still so long as one was keeping the car in restraint or in position to regulate its movements. Preventing a car from moving is as much control and dominion as actually putting the car in motion on the highway. Could one exercise any more regulation over a thing, while bodily present, than prevention of movement or curbing movement[?] As long as one were physically or bodily able to assert dominion, in the sense of movement, then he [or she] has as much control over an object as he [or she] would if he [or she] were actually driving the vehicle."

Id. at 628 (quoting ***State v. Ruona***, 321 P.2d 615, 618 (Mont. 1958)). Indeed, a drunk driver, sleeping in a parked car with the motor running, has less physical control over that vehicle than a snowmobile operator, sitting awake at the controls of a parked snowmobile with the motor off.[8] *See also* ***State v. Modory***, 204

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[7] WISCONSIN STAT. § 346.63(3)(b) provides, "'Operate' means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion."

[8] And, indeed, affirming the trial court's interpretation would render a truly ironic result: the operator of a snowmobile that is stopped with its motor off *would not* be negligent per se, while the operator of a snowmobile that is stopped with its motor on *would* be negligent per se, although he or she would be better able to quickly respond to a dangerous situation. As Burg fairly argues:

Wis. 2d 538, 544, 555 N.W.2d 399 (Ct. App. 1996) ("***Proegler*** does not say that movement is necessary; rather, it merely says that if the defendant exercises dominion *in the sense of movement*, then the fact of operation has been established.").

¶13 As Burg correctly argues, the legislature, quite obviously, enacted the detailed requirements of WIS. STAT. § 350.09 in part because it "wants snowmobilers at night to illuminate their head and tail lamps so other people in the vicinity can see them." *See* ***Parr v. Douglas***, 253 Wis. 311, 318-19, 34 N.W.2d 229 (1948) (explaining that statutes governing trailer lights establish safety standards, the violation of which "shall be *prima facie* evidence of unsafe practices in the use of the public highway by such vehicles"). To conclude, nevertheless, that the mandate of § 350.09(1) does not apply to the circumstances of this case would indeed be "stupid." Such a conclusion would require an absurd statutory interpretation precluding the literal reading and commonsense application of the statute to one of the most serious dangers these safety standards are intended to prevent.[9] *See* ***Lyons***, 137 Wis. 2d at 449 (explaining that statutes are to be construed to avoid absurd results).

> [E]veryone agrees that Zimmerman would have been negligent per se for sitting in the dark with his engine running and his lights off. To then argue that he is not negligent per se by turning both his engine and lights off only rewards Zimmerman for his unreasonable action. This is nonsense.

[9] The dangers of snowmobiling are extremely serious. According to the Wisconsin Department of Natural Resources, thirty-eight fatal snowmobile accidents were reported in Wisconsin for fiscal year 1999-2000, and collision with an object was the leading cause of death. Wis. Dep't of Natural Res., *1999-2000 Snowmobile Program Report Summary*, *at* http://www.dnr.state.wi.us/org/es/enforcement/safety/snowmobile_report.html. Not surprisingly, therefore, the legislature has made the "operator of a snowmobile upon a roadway" subject to numerous rules of the road governing operators of other motor vehicles. *See* WIS. STAT. § 346.02(10).

B. Damages

¶14 Burg also argues that "[t]he jury's award of damages was so perverse that it warrants a new trial in the interests of justice." He explains that "[his] medical condition was never in issue," and that the defense "called no medical witnesses" to counter the undisputed evidence of his permanent injuries. Further, he points out that the jury awarded damages that were considerably less than what even *the defense* suggested.

¶15 Zimmerman does not dispute Burg's factual assertions. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted). He simply argues that "[e]ven if this court were to find the damages awarded by the jury in this case inadequate, a new trial in the interests of justice is not warranted." Zimmerman, however, premises his argument on the principle that "where the jury verdict finding the plaintiff solely negligent in causing his own injuries is supported by credible evidence upon the record, inadequate damages is not a ground for a new trial." True enough; but where, as here, the jury's verdict cannot stand because the plaintiff was denied the correct ruling on Zimmerman's negligence per se, a new trial is required on both liability and damages. *See* ***Martin v. Allstate Ins. Co.***, 45 Wis. 2d 657, 663, 173 N.W.2d 646 (1970) (when damages award has been challenged as excessive, and error in law necessitates new trial in interests of justice, "the issue of damages should be retried with the issue of liability"); ***Mainz v. Lund***, 18 Wis. 2d 633, 645, 119 N.W.2d 334 (1963) (although inadequate damages award "is not in itself grounds for ordering a new trial where a jury has answered other questions in the verdict so as to find no liability on the part of the party charged with negligence," the inadequate damages

award may be significant in determining whether interests of justice require new trial where "the finding of no liability is against the great weight of the evidence").

By the Court.—Judgment reversed.

¶16 CURLEY, J. (*dissenting*). The controversy in this case surrounds the interpretation of WIS. STAT. § 350.09(1) which requires, in part, "Any snowmobile operated during the hours of darkness ... shall display a lighted head lamp and tail lamp." Burg urged the trial court to find that Zimmerman had violated this safety statute and, consequently, was negligent per se. The trial court disagreed, finding that the definition of the verb "operate" found in the statutes did not encompass the facts presented here. Those facts are that Zimmerman, while keeping the keys in the ignition, decided to stop his snowmobile by turning off the ignition, which resulted in the extinguishment of the head and tail lamp, in order to chat with his fellow snowmobiler. By contorting the statute and borrowing phrases from other cases, the majority opinion has redefined the word "operate" to place Zimmerman's conduct within the statute. I disagree and respectfully dissent.

¶17 The interpretation of a statute is a question of law which this court reviews *de novo*. ***State v. Ambrose***, 196 Wis. 2d 768, 776, 540 N.W.2d 208 (Ct. App. 1995). The goal of statutory interpretation is to discern and to give effect to the intent of the legislature. ***Hackl v. Hackl***, 231 Wis. 2d 43, 47, 604 N.W.2d 579 (Ct. App. 1999); ***State v. Cardenas-Hernandez***, 219 Wis. 2d 516, 538, 579 N.W.2d 678 (1998). The primary source for statutory construction is the language of the statute itself. ***Wisconsin Envtl. Decade v. Public Serv. Comm'n***, 81 Wis. 2d 344, 350, 260 N.W.2d 712 (1978). In determining the meaning of any single phrase or word in a statute, it is necessary to examine it in light of the entire statute. ***State v. Board of Trs.***, 253 Wis. 371, 373, 34 N.W.2d 248 (1948). Where the statute is ambiguous, we may look to the legislative intent found in the

language of the statute in relation to its scope, history, context, subject matter, and objective intended to be accomplished. ***Wisconsin Envtl. Decade***, 81 Wis. 2d at 350; ***State v. Wachsmuth***, 73 Wis. 2d 318, 324-25, 243 N.W.2d 410 (1976); ***Ortman v. Jensen & Johnson, Inc.***, 66 Wis. 2d 508, 520, 225 N.W.2d 635 (1975); ***State v. Automatic Merchandisers***, 64 Wis. 2d 659, 663, 221 N.W.2d 683 (1974); ***Wisconsin Southern Gas Co. v. Public Serv. Comm'n***, 57 Wis. 2d 643, 648, 205 N.W.2d 403 (1973). The objective to be accomplished must be given great weight in determining legislative intent. ***Town of Menomonee v. Skubitz***, 53 Wis. 2d 430, 437, 192 N.W.2d 887 (1972). If the statute's language is clear, we look no further and simply apply the statute to the facts and circumstances before us. *See* ***Jungbluth v. Hometown, Inc.***, 201 Wis. 2d 320, 327, 548 N.W.2d 519 (1996). An interpretation of a statute is unreasonable if it directly contravenes the language of the statute, is plainly contrary to the legislative intent underlying the statute, or lacks a rational basis. ***Trott v. DHFS***, 242 Wis. 2d 397, 409, 626 N.W.2d 48 (Ct. App. 2001). Here, the majority's interpretation contravenes the clear statutory language and lacks a rational basis.

¶18 The legislature's definition of "operate," found in WIS. STAT. § 350.01(9r), reads: "'Operate' means the exercise of physical control over the speed or direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion. 'Operate' includes the operation of a snowmobile." There is nothing ambiguous about the language found in the statute which requires us to resort to other aids in interpreting the statute. Clearly, one operates a snowmobile when one controls either the speed or direction of the snowmobile or when one physically manipulates or activates the controls. A snowmobile stopped without the engine

running or any controls activated, by virtue of the definition, is not being "operated" by the person sitting on it.

¶19 Here, Zimmerman was neither running nor moving his snowmobile when Burg was injured. While sitting on a snowmobile, stopped and turned off in the middle of a well-used snowmobile path on a dark night while wearing dark clothes surely must be negligent conduct, it does not constitute "operating" the snowmobile. Evidence was presented that in order to start the snowmobile, Zimmerman was required to both turn the key and pull a rope. When a person sits on a snowmobile that is not on, has the keys in the ignition in the off position, and, further, needs to pull a rope to start the engine, one is not exercising physical control over the speed or direction of the snowmobile. There was neither a speed nor a direction. In addition, Zimmerman was not physically manipulating or activating the controls necessary to put it in motion.

¶20 While the majority would make it appear that Zimmerman was in the process of slowing down and turning off the engine when the accident occurred, no evidence supports this conclusion. The record states that Zimmerman's engine had been turned off for *five* minutes before the accident. Therefore, the interpretation given by the majority opinion, that because Zimmerman once exercised physical control over the speed of the snowmobile by stopping it and turning it off some time before the accident occurred, but remained seated on the snowmobile, he was still "operating" the vehicle when the accident occurred, twists and distorts the interpretation of "operate."

¶21 Were the majority's definition to be adopted, there would be no logical stopping point. How much time need expire for someone seated on the snowmobile, after turning off the ignition and leaving the keys in the ignition, in

order to no longer be "operating" the snowmobile? Is a person operating a snowmobile if he turns off the snowmobile and removes the keys, but remains seated on the snowmobile? What if someone stops the snowmobile, leaves the keys in the ignition, walks away from the snowmobile but returns and sits on it — is he still "operating" the snowmobile? Consider whether an underage person, who sits on a snowmobile stored in a garage with the keys in the ignition, is guilty of operating a snowmobile contrary to WIS. STAT. § 350.02. Clearly, the majority's attempt to reshape Zimmerman's conduct so as to fit within the definition of "operate" in order to find Zimmerman negligent is misguided and fraught with problems.

¶22 Moreover, contrary to the majority's contention, both the ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), and ***State v. Modory***, 204 Wis. 2d 538, 555 N.W.2d 399 (Ct. App. 1996), cases support the legal conclusion that Zimmerman was not operating the snowmobile when the accident occurred. As noted in the majority opinion, Proegler was found guilty of operating his vehicle while under the influence of an intoxicant when he was found sleeping in a car with the motor running. The holding of the case states that one is operating a vehicle when "a defendant starts the motor and/or leaves it running." ***Proegler***, 95 Wis. 2d at 614. Zimmerman was doing neither when the accident occurred.

¶23 Modory was convicted of operating while intoxicated when he was discovered in his pickup truck, seated in the driver's side of the car with the engine running and the wheels spinning. The truck was not moving, however, because it was resting on a mound of dirt which prevented the tires from making contact with the ground. In affirming his conviction, this court said:

> We agree with the State's argument. Section 346.63(3)(b), Stats., does not require movement. The statute only requires that the defendant physically manipulate or activate any of the controls "necessary to put [the motor vehicle] in motion." There is little doubt from the evidence in this case that Modory performed the requisite acts under this statute. He was behind the wheel of a vehicle with the engine running and was attempting to free the vehicle from its stuck position.

Modory, 204 Wis. 2d at 544. Again, the undisputed facts are that Zimmerman's snowmobile engine was off, had been off for some time, and he was not attempting any movement when the accident occurred. Under both holdings, Zimmerman clearly was not operating the snowmobile.

¶24 I suspect the real concern behind the majority opinion's ill-conceived definition of "operate" is its objection to the jury's finding that Zimmerman's acts were not negligent at all and to the jury's award of inadequate damages to Burg. If true, then the majority should have questioned whether they were "satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain [the jury's verdict]," ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996), and, depending on the answer, remand for a new trial. Attempting to squeeze this factual situation into the definition of "operate" will only serve to obfuscate the law and result in additional litigation.

¶25 Accordingly, I respectfully dissent.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

KARL A. BURG by his legal guardian,
GLADYS M. WEICHERT,
PLAINTIFFS,

VS. CASE NO. 98-CV-008875

CINCINNATI CASUALTY INSURANCE CO.,
and ROBERT W. ZIMMERMAN,
DEFENDANTS.

July 26, 1999 HON. MICHAEL MALMSTADT,
Circuit Court Judge Presiding

A P P E A R A N C E S

VICTOR HARDING appeared on behalf of the Plaintiffs.

GREGORY COOK appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

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COPY

P R O C E E D I N G S

MADAM CLERK: 98-CV-008875, Karl Burg v. Cincinnati Casualty Insurance Company.

Appearances, please?

MR. HARDING: Victor Harding for the plaintiff.

MR. COOK: Greg Cook on behalf of the defendant.

THE COURT: Go ahead.

MR. HARDING: This is the plaintiff's motion, Your Honor. It is a motion to have the Court find the defendant, Zimmerman, negligent as a matter of law. It is a pretty straight forward issue. I believe the statute requires that at night a snowmobiler have his headlights and taillights illuminated. The accident happened at night. The defendant did not have his headlights on or taillights and, therefore, is negligent as a matter of law.

I think the statute is quite clear. There are similar statutes requiring motor vehicles to have headlights on at night and it has been found to be a safety statute violation which is negligence per se if they are not, and this would be a certain counterpart.

The other issue is whether at the time Zimmerman was operating the sled it was turned off. I think it is pretty clear to us that this is in the continuum of operation under the very broad definition of operation under the law. The definition of operate indicates that you only have to have physical control over any of the controls of the snowmobile in order to put it in motion, which indicates that it is contemplated that operate would include even if the snowmobile wasn't in motion. In any event, Zimmerman had complete control over the snowmobile and, therefore, is negligent as a matter of law.

THE COURT: Okay. Thank you.

MR. COOK: I think the definition for operation is way too broad here that you are being asked to incorporate into this case. First of all, this is going to be a factual case of liability on behalf of both parties. There is contributory negligence being alleged against Mr. Burg in this case. A finding as a matter of law early on in a case like this that someone is negligent per se is a pretty tough thing to do.

The definition of operation under 350.01

clearly talks about the exercise of physical control over the speed and direction of the vehicle and not necessarily the right to exercise it. Therefore, I think the definition is too broad and it is so broad that anybody sitting on a snowmobile at night would, under Mr. Harding's definition, seem to be operating the vehicle.

Snowmobiles are somewhat like motorcycles in that either the lights are on when the engine is operating and when the engine is turned off the lights go off. You can't have the engine on and the lights off.

In this particular case one of the statutory issues that we have is whether or not the section says any snowmobile operating during the hours of darkness shall display a lighted headlight or tail lamp.

Initially the thrust of this motion was to say he was on the highway and operating at night with his lights off. His vehicle was stopped. He was talking to his friend sitting next to him on this unfinished portion of the highway which had not been completed yet. Now the motion has shifted over to say what we are really trying to

say is that this falls within the definition of operation whether it is in the daylight or at night.

If you look at the term operation, it is clear that the vehicle must be moving, it must be on, and you must have an opportunity to operate it. The fact that this vehicle was shut off makes it more significant than I think Mr. Harding wants to admit. That means that once this machine is off it is not being operated and, therefore, it is not illegal to sit on a snowmobile at night when it is not being operated as long as you are not on a snowmobile trail and not violating any other provisions of the rules of the road. In this particular case the fact that these snowmobiles were turned off and the lights were off at that time does not amount to negligence per se at all. It doesn't fit within the definition of the statute. It doesn't fit within the definition of operating.

This case will be decided upon the issue of lookout, management, control and speed of the other vehicle. If anything, there is an argument against our insured, our client, as well as the other driver, for stopping where

they did knowing that other snowmobiles might come across in this area. This is a 60 foot wide area that we are talking about here. There are two lanes plus side lanes.

More importantly, I think this statute does not mean that if you are on a snowmobile at night with it turned off and you are sitting on it that you are indeed operating it. Therefore, I think the motion should be denied.

MR. HARDING: Very briefly, Your Honor.

The defendant is complaining that because you turn off your engine your lights automatically go off and that shouldn't be that way. If they want to bring Polaris into the case, they are welcome to do that. That is not an issue before the Court. I think if you are sitting on a snowmobile at night, the law requires that you have your headlights be on. That is where the issue will lie.

THE COURT: I was unable to find any specific definition that applies to operation of snowmobiles. There are all kinds of definitions that apply to operation of vehicles. Those definitions primarily come from the drunk driving realm where people are found in their

cars under certain circumstances and alleged to be operating a parked vehicle while the motor is running. If there is a parked vehicle without the engine running, generally speaking you are not operating.

What I was looking at just now, it I may not be analogous but I think it is close, and that is the regulation concerning boats. When you are in a motor boat, when you are stopped in the water, you are required to show a light. When you are operating a row boat at night or a sailboat at night, you are not required to show a light. You are required, however, to have one that can be shown when approaching water craft is in the area.

If the legislature wanted to require people who stop and park somewhere with a snowmobile to have a light on it when it is stopped, they could have said so. They have said so with other vehicles such as boats. I don't believe they have said so with snowmobiles. This accident shows a good reason why they should. As I understand it, this was Loomis Road, Highway 36, while it was under construction and people were using it as kind of like a super

highway for snowmobiles, which is understandable. You see it all the time along construction roads.

I guess there is no dispute that Mr. Zimmerman stopped his snowmobile and was sitting on it talking to another guy who also had a snowmobile, and they were sitting there. Sitting on it I don't believe under the law is operating it.

I was not aware of what counsel said, but if that is accurate that the lights are on when it was running, the only way that I can envision that you would be required to have lights on it when the engine isn't running is if you were towing it. That would be operating it just like towing an automobile is operating it. You are using some of the mechanisms required to be put in place to operate it. In other words, you have a steering handle and you can be steering. Sitting on a towed snowmobile in my view would be operating it and I suppose you better put a light on it. If the engine isn't running and you are not moving and just sitting on it, under the law I don't believe that entails operation. Based upon that view the motion for finding that

Mr. Zimmerman was negligent per se for sitting there with his headlights off is denied.

MR. COOK: I will prepare an order.

MR. HARDING: So there is no issue of fact, you are ruling, as a matter of law, that he is not operating the snowmobile?

THE COURT: Right.

MR. HARDING: Okay.

THE COURT: Clearly, if he was operating he has got to have his light on.

*****

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)
) SS
COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on July 26, 1999, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 2nd day of January, 2001, in Milwaukee, Wisconsin.

Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

KARL A. BURG, et al,

Plaintiffs,

-vs- CASE NO. 98-CV-008875

CINCINNATI CASUALTY INSURANCE, et al

Defendants.

- -

June 1, 2000

Before the HONORABLE MICHAEL MALMSTADT,

Circuit Court Judge, presiding.

JURY TRIAL - PART III of IV

A P P E A R A N C E S :

VICTOR C. HARDING, Attorney at Law, appeared on behalf of the plaintiffs.

GREGORY J. COOK, Attorney at Law, appeared on behalf of the defendants.

Donna J. Richmond, Court Reporter

Q Okay. And, of course, that taillight must be displayed such that it can be scene from 500 feet back, correct?

A Correct.

Q And this was an accident at night, correct?

A Correct.

Q And we know that Mr. Leighton and Mr. Zimmermann did not have their headlights or taillights on, correct?

A Correct.

Q And they were operating their sleds at the time of the accident?

MR. COOK: I'm going to object.

THE COURT: Sustained. We're getting real close.

MR. COOK: Yes.

MR. HARDING: Well, side-bar then, Your Honor?

THE COURT: Okay.

(Discussion had off record.)

THE COURT: Ladies and gentlemen, I want you to go upstairs. Don't talk about the case. We'll get you down here when we're done.

(Jurors excused.)

THE COURT: Let's start from -- right from the beginning. That has become confusing I think.

There has been constant testimony about when you have to have your light on, on a snowmobile. And I think the impression that the jury has right now is wrong. And that is that a snowmobile must be operated with its light and taillight on when it is on a highway or a roadway right-of-way.

That's not the law. The law is that a snowmobile, when operated at night, no matter where you're operating it, a lake, a river, doesn't matter, the nighttime operation with a light has no relationship to whether it's on a highway, roadway. The only time the highway or roadway comes into it is during daylight hours. During daylight hours if you're operating on a roadway or along a roadway, you have to have your light on. At night, no matter where you're operating it, you have to have your light on. I think the statute clearly says that.

Okay. The other thing is, and we have done this a number of times, it's this Court's ruling, and whether it's right or wrong we're stuck with it, a snowmobile that is stopped, parked with the engine off is not as a matter of law being operated. Since it is not being operated as a matter of law, unlike the boating regulations in this state, where if you park a boat with a motor on it in the middle of a lake at

night, you better have a light on because that's the law.

Snowmobiles for some damn reason in this state can be parked without a light, according to the law. Now, that does not mean that parking it without a light on in the middle of a pathway used by other snowmobiles is not negligence. It's just not statutorily prohibited.

And I think we have to -- we have to be real clear on that. We've gotten very close -- you asked him if they were operating those snowmobiles at the time they were sitting there, and the answer to that is no, they weren't. Why is that the answer? I can give you no other answer than I said so. I said so for a long time in this case.

MR. HARDING: See, Your Honor, I understand that. In my humble opinion it's an issue of fact. And this witness is here with special knowledge, special expertise. I didn't know he had all this knowledge and expertise, and I merely wanted to find out what his understanding was. And I'm not trying to tread or -- but I have to find out what the answer is and make a record because if the Court is, in fact, wrong, then it seems to me --

THE COURT: We'll be trying this case over

again.

MR. HARDING: No, we haven't -- nothing -- it has -- there isn't damage yet.

THE COURT: I think there is. If I'm wrong on this issue, it is crucial to your case.

MR. HARDING: Of course.

THE COURT: It is, you know, if the Supreme Court or if the Court of Appeals says I'm wrong and then says it's harmless error, they're goofy. If I'm wrong, this is reversible without a doubt. No question about it. But I don't think I'm wrong, you know. I'm fairly confident I'm right. I don't like the law. I think the law is stupid, but I'm stuck with what the law is.

You know, I think when two people park their snowmobile out there and are sitting around talking about what route they're going to take, it's hard for me to comprehend how the law can say that's not operating, but it does.

MR. HARDING: Well, I understand. I know the Court's ruling. I think this witness can add testimony in that area.

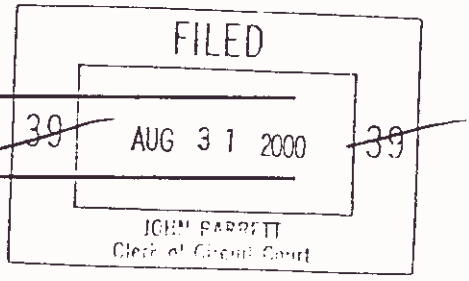
And maybe the Court is right, maybe the Court has made an incorrect ruling up to this point, and maybe the Court can correct its ruling if it feels

STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY

KARL A. BURG,
Plaintiff,

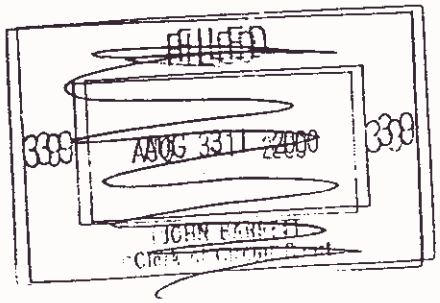
-vs- Case No. 98-CV-008875

CINCINNATI CASUALTY INSURANCE CO et al
Defendants.



DECISION

The Plaintiff has moved this Court for a new trial. Because a new trial is only granted in exceptional circumstances and because there is credible evidence to support the jury's verdict, it shall not be disturbed. The plaintiff's motion for a new trial is denied.



BACKGROUND

This case arises out of a motor vehicle accident involving several snowmobiles. On November 29, 1995, about one hour after sunset, Karl A. Burg (Plaintiff) was traveling south parallel to Highway 36, in Racine County. At the time, two new lanes were under construction, but not yet available for automobiles, which made it very popular as a snowmobile path. A few moments before this, Robert W. Zimmerman (Defendant) and Dean Leighton pulled on to the path, stopped their snowmobiles and turned off the ignition so they could talk. When they turned off their engines the headlights were automatically extinguished because the headlights will not operate when

was not turned on, and that he was not engaged in any physical manipulation or activation of the snowmobile's controls.

Plaintiff cites County of Milwaukee v. Proegler, 95 Wis.2d 614, 626, 291 N.W. 608, 613 (Ct. App. 1980) and State v. Modory, 204 Wis.2d 538, 555 N.W.2d 399 (Ct. App. 1996.) These cases interpret drunk driving law, and stand for the proposition that a driver need not put his vehicle in motion to fall within the definition of "operate." In both cases the defendant was sitting behind the wheel of a vehicle with the engine running. Furthermore, the term "operate" is defined much more broadly in operating while intoxicated cases for reasons of public policy. This is a matter of legislative intent in formulating strict drunk driving laws. Because there was no evidence at trial that any of the parties were intoxicated, the definition of "operate" in Proegler, and Modory, is not applicable in the present case.

The Plaintiff also cites a series of out of jurisdiction cases. These cases interpret a very different statute that dealt with actual "physical control" of a vehicle. The issue in this case revolves around the definition of "operate" and is therefore distinguished from the cases cited by the plaintiff.

The Defendant argues that new trials are granted only under very limited circumstances. "This court is reluctant to grant a new trial in the interest of justice and exercises its discretionary power only in exceptional cases." We do not find this to be an exceptional case. State v. Friedrick, 135 Wis.2d 1, 35,398 N.W.2d 763 (1987 Quoting State v. Cuyler, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983.)) The plaintiff has failed

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to present any evidence that there has been a miscarriage of justice. "'There has been no showing of a miscarriage of justice, nor does it appear that a retrial under optimum circumstances will produce a different result." We therefore deny Defendant's request for a new trial." Id.

The jury determined that the defendant, Mr. Zimmerman was not negligent, and that the plaintiff Mr. Burg was negligent and was therefore responsible for his own injuries. A jury's apportionment of negligence and it's award of damages will be sustained if there any credible evidence that supports the verdict. See Gonzalez v. City of Franklin, 137 Wis.2d 109, 134, 403 N.W.2d 747 (1987.) Given the facts in this case, there is sufficient evidence to support a view that at the time of the accident the defendant was not operating his vehicle negligently or otherwise. Therefore the jury's verdict will not be disturbed, and plaintiff's motion for a new trial is denied.

Dated at Milwaukee, Wisconsin, this 31 day of August 2000.

BY THE COURT:

Honorable Michael Malmstadt
Circuit Court Judge
Branch 39

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 39

KARL A. BURG by his legal guardian,
GLADYS M. WEICHERT,

Plaintiffs, CASE NO. 98-CV-008875

vs.

CINCINNATI CASUALTY INSURANCE CO., and
ROBERT W. ZIMMERMAN,

Defendants.

JURY TRIAL

BEFORE THE HONORABLE MICHAEL G. MALMSTADT,
CIRCUIT JUDGE PRESIDING

MAY 30, 2000

A P P E A R A N C E S:

VICTOR C. HARDING, Attorney at Law, appeared on behalf of the Plaintiffs.

GREGORY J. COOK, Attorney at Law, appeared on behalf of the Defendants.

BONNIE H. DOMASK
Court Reporter

Q For the highway?
A Right.
Q There would have been a shoulder?
A Correct.
Q Then you would have a drop-off?
A Yes, ditch on each side.
Q So if we take a roadway, one lane is like 12 feet; are you aware of that?
A No.
Q Just assume that's accurate. A roadway would be 24 feet wide. Then you've got the shoulder space on each side. Do you know how far the shoulder space is on either side?
A No, I don't.
Q If you're guessing or estimating 10 feet on either side, then we are looking at an area between 40 and 45 feet?
A Yes, it's quite large.
Q Does that sound about right?
A Yes.
Q So you then traveled in what direction when you crossed 36?
A North.
Q So we started down here on Exhibit 30, and you traveled this way?

A Correct.
Q Can you tell me about how far it is from Rochester up to Malchine Road? I'm not looking for anything precise. Maybe a mile?
A Yes, mile.
Q Five or 10 miles?
A Maybe six miles or so.
Q So -- And you're still on the new construction the whole way?
A Correct.
Q As you pass -- Or you went up to what road?
A We stopped at Malchine Road.
Q Why did you stop there?
A There were road barricades there preventing a car from driving on that section of road.
Q Okay.
A We just came to a complete stop.
Q As you drove north, did you see any other snowmobiles?
A No, I did not.
Q Could you tell whether this stretch had been used by snowmobilers before?
A Yes, it had.
Q When did it snow, do you know?
A I think it snowed the night of the 28th.

Q Okay. And so you're out on the 29th?
A Right.
Q This was available to snowmobilers all day long?
A Correct.
Q Do you know how many trails there were on this, say, 40 to 45 feet of improved road? How many trails?
A This was about three to four snowmobile tracks wide. A path that was three to four tracks wide down the middle would then support additional snowmobiles that had gone off the sides.
Q All right. And we now know that the impact of the accident itself occurred maybe about a third of a mile south of Malchine Road as you traveled past that point of impact going north. Did you see any other snowmobilers going north at that time?
A No, we did not.
Q You -- Did you stop at Malchine Road?
A Yes.
Q How long did you stop there?
A About three to five minutes.
Q Okay. Are you saying it was approximately five minutes from the point of impact up to Malchine Road and back or did you stop?
A We stopped at Malchine Road and talked.
Q How long was that for?

A About five minutes.
Q Okay. And then what did you do?
A We turned around.
Q And started to head in what direction?
A South again.
Q And what tracks were you in?
A In the same tracks we had just driven in.
Q Who started out first?
A We were abreast, and Karl got in front of me.
Q Between you and Karl, do you have a specific relationship on sleds as to who goes first?
A No.
Q Okay. So he could be out first, or you could be out first?
A Correct.
Q It just happened that Karl went out ahead of you?
A Correct.
Q There's no other reason for the fact that he did it? You could have been out first?
A Correct.
Q Then you started to go south?
A Correct.
Q And in the same tracks?
A Right.
Q As you started out, how fast did you start to go?

A Well, when our speeds planed off, we were 35 to 40 miles per hour.
Q When you were traveling north along 36 in this new construction, how far were you going?
A Depends. There are crossroads all along. So we had to stop. So anywhere to two to three miles an hour up to 35 to 40 miles an hour.
Q Besides stopping for a cross street or anything like that, what was your normal traveling speed?
A About 35 to 40 miles per hour.
Q If you were in front, would Karl fall behind; or did you stay in tandem?
A I stayed the same speed he did. I kept it the same amount of distance behind him.
Q Okay. That's the usual way you do it?
A Yes.
Q Because if you lag too much, he goes way out ahead of you?
A Correct.
Q If you go too fast and you come up on him, you get snow in your face?
A Correct.
Q It was your intent to just travel that night and stay together?
A Correct.

Q So then as you left, Karl got out ahead of you?
A Correct.
Q You were up at Malchine Road, turned around and headed south. Karl would go ahead of you, and you started to pick up speed?
A Correct.
Q How far behind him are you?
A About 100 to 110 feet.
Q How do you know that?
A Well, it was about the distance of my driveway. I measured my driveway. It's about 110 feet.
Q Was that at this point far enough back that you could see his taillights?
A Yes.
Q And can you see him too?
A The silhouette of his back.
Q Is there snow being kicked up?
A A little bit.
Q Is there a particular reason why you went 100 to 110 feet back? Is that the normal thing you did?
A To give myself a little distance from being thrown up in his track.
Q When you were going 35 to 40 miles per hour in either direction, is there anything uncomfortable about doing that on a snowmobile?

A No. I don't think so, not for me, no.
Q What type of day was this?
A It was already dark then.
Q The accident occurred at 5:30, so we are slightly before that time?
A Quite.
Q So it's dark outside?
A Correct.
Q It's this late November?
A Yes.
Q Do you remember if the stars were out, or was the moon out?
A It was a dark night. It was a very dark night.
Q All right. Then did Karl get up to a certain speed?
A Approximately the same speed I was going, yes.
Q And that is what?
A 35 to 40 miles per hour.
Q Then as you're now headed south over this track you already had been on, what happened next?
A I saw Karl's brake lights go on.
Q Okay. Anything else happen when you saw his brake lights go on?
A Yes. His brake lights went on. He veered slightly to the right, and then his taillights violently jerked and fishtailed, and there was a burst of snow

all kind of together.
Q And then?
A And his lights went out.
Q Okay. What did you do when you saw that?
A When -- First, when his brake lights came on, I grabbed my brakes. When his lights went out, I locked up my brakes and stopped.
Q Okay. Time is a difficult thing to estimate sometimes; but once you saw his brake lights first go on to the time the lights went out, how much time are we talking about?
A About a second or two, very quick.
Q When a snowmobile -- When you lock up a snowmobile on snow like you were on, what happens?
A Most of the time, the snowmobile kind of fishtails a little bit or goes sideways. It doesn't normally stop straight.
Q So a car may come down to stop straight. What happens to the back end of the snowmobile?
A It kind of moves around and fishtails a little bit.
Q That is what you saw that night?
A Well, that's what I first thought he had done was grabbed his brake and it fishtailed on him.
Q Okay. Then you saw the lights go out?
A Yes.

Q And what is there that alerts a snowmobile operator, such as Burg, that he's coming onto other snowmobiles?
A Well, usually the first thing you would see if the lights are on, you would see the taillights. If the lights are off, the mostly likely thing you would first see is the reflection of your helmet bouncing off the reflective light from the snowmobile in front of you.
Q We know in this case there are reflective lights on the back of this snowmobile?
A Yes.
Q In your deposition, a person at night might start to be able to pick up the retroreflector from 400 feet back?
A About 400 feet is when you first start to notice something was there.
Q What you mean is at 400 feet you start to notice something?
A Generally, we've done a lot of tests with this stuff, not with these two specific snowmobiles. Generally speaking, if you're out there and you put a snowmobile way out ahead and kind of inch up and look for the light or look at the front of the snowmobile, you will usually see it at about 400 feet; but at

exists?

A Only as from the diagram out in the middle of the road.

Q Burg's helmet was recovered after the accident, correct?

A Yes, sir; that's correct.

Q You're aware of the fact that no visor was found?

A Yes, I was.

Q You have no information on that visor; is that correct?

A No, sir.

Q You do understand that the helmet was discarded prior to your involvement in this case?

A I didn't know it was discarded, but I knew it wasn't available for me to look at.

Q It's your opinion that the helmet left Mr. Burg on impact with the Leighton sled?

A Correct. Mostly I can't be certain with that but most likely.

Q That's to a reasonable degree of certainty based on your experience, a reasonable estimate based on reasonable certainty that probably led you to conclude that his helmet was probably not attached before the accident, in other words, the chin strap?

A Either it wasn't attached or it failed.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

KARL A. BURG, et al,

Plaintiffs,

-vs- CASE NO. 98-CV-008875

CINCINNATI CASUALTY INSURANCE, et al

Defendants.

- -

May 31, 2000

Before the HONORABLE MICHAEL MALMSTADT,

Circuit Court Judge, presiding.

JURY TRIAL - PART II of IV

A P P E A R A N C E S :

VICTOR C. HARDING, Attorney at Law, appeared on behalf of the plaintiffs.

GREGORY J. COOK, Attorney at Law, appeared on behalf of the defendants.

Donna J. Richmond, Court Reporter

A Yes.
Q And then this photo tries to show -- I'll zoom in a little bit. This is the gravel that comes up to 36 and this is the median, and then what's now the concrete on the other side is where you pulled into, correct?
A Correct.
Q So you have to go through a median and then you turn and you start to face your sleds to the south?
A Correct, correct.
Q There's a little better photo of the median, okay. There's -- it's in focus and this is the median. I'll give you another angle here. The median, that's the median that you cross over into what was then -- there we are. You cross over and then this roadway was not here, this roadway was not here at the time. You came in here and this is the gravel portion -- is where you pulled in?
A Yes.
Q Okay. You then -- you can sit down. You then pulled your sleds in and Leighton was leading; is that correct?
A Correct.
Q He then went through the median, turned south and came to a stop?

A Yes.
Q You then pulled in and you came to a stop?
A Yes.
Q And then it ostensibly was to chat?
A Correct.
Q And to do that you decided to turn off your sleds?
A Correct.
Q And who turned the sled cff first, you or Leighton?
A I believe Leighton.
Q Okay. And do you know why he was stopping?
A No, I don't.
Q But it's your best recollection that you pulled up side by side?
A Yes.
Q And you turned your sleds off, and why did you do that?
A Probably to talk.
Q You then sat there for -- or strike that. When you turned your sleds off, does that turn the lights off?
A Yes.
Q Do you turn the lights off first and then turn the sleds off?
A No.
Q Okay. So if you just take the key and you turn it, the engine stops and the lights go out?
A Yes.

Q And then if you turn them on, that key is just a key, right? Does yours have a pull start?
A It's a pull start. It's like a lawn mower, you have to pull it.
Q Okay. So then you knew -- you stopped your sled. You knew that to get going again both of you were going to have to get off and go back and pull the pull start?
A You don't really have to get off, but it's a lot easier.
Q Okay. Is it right near where your handle is?
A It would be right next to your leg. You could just pull it.
Q Okay. So before you could ever get your lights going again, you had to get that engine going?
A Yes.
Q Now, of course, you can sit there and turn the lights out, correct, and leave the engines running? You could run it without the lights on? You can have your snowmobiles, your Polaris running during the day without the lights on?
A No.
Q It's automatic those come on?
A Yes.
Q And does the taillight then automatically go on also?
A Yes.

Q So you don't have to do -- turn any lights or anything else?
A No.
Q Is that the way all snowmobiles run?
A I believe so.
Q You've owned a number of snowmobiles?
A Yes.
Q And the one that you've always owned, they operated with the lights only when the engine was running?
A Yes.
Q And always when the engine was running the lights were on?
A Yes.
Q And -- strike that. Older models sleds don't do that, for instance, like Burg sleds don't do that?
A Do what?
Q You have to turn the lights on or you can operate it without the lights on? Do you know that?
A No, I don't.
Q Now, while you were sitting there stopped, you talked for about five minutes?
A Yes.
Q And then all of the sudden you turned and Leighton was gone; is that right?
A I don't know if I turned. He was just gone. I might

have been turned towards him already and somebody hit him.

Q In any event, you never saw or heard Burg's sled coming?

A Correct.

Q You never saw a flicker of light or anything else?

A No.

Q And then the impact occurred, and you finally realized what had happened?

A Yes.

Q After that it became somewhat chaotic?

A Yes.

Q Now, let's back up for a second. To talk to Mr. Zimmermann, you, of course, could have left your sleds running? I mean Mr. Leighton, sorry. You're Mr. Zimmermann.

A What was the question again?

Q You could have sat there with Mr. Leighton in the track and left your sleds running, correct?

A Yes.

Q Could have taken your helmets off?

A Yes.

Q But ostensibly you chose to turn the sleds off and the lights off and leave your helmets on and talk?

A Yes.

stopping distance from when a driver would perceive a hazard, react, put the brakes on and the vehicle come to a stop. And I made those calculations, if you want to know those numbers.

Q Right, I know you did. Before you give me that number, what type of coefficient of friction did you apply in this case given the evidence that you had and why?

A I used .45 to .55 for the stopping distance calculation. And I used it because of the type of surface. I understood the snow, but it was on gravel. There wasn't ice out in the middle of the lake, there wasn't glare ice. I took the snowmobile to be in good condition and the brakes were in good condition, that they weren't defective in some way.

Q What did you conclude that the total stopping distance would be, assuming a snowmobile the type Mr. Burg was operating was traveling 40 miles per hour?

A At 40 miles an hour I have 156 to 177 feet.

Q Point of recognition to the time of complete stoppage?

A Correct, from the hazard to being stopped. And that's on a level such as at the accident site.

Q How does that distance differ, let's say -- let's push this sled up ten miles an hour, all other things equal.

A If you're at 50 miles an hour, the stopping distance

measured. And then at 50 feet, I then put an orange cone on the right side of the path, and on the left side at a hundred feet I put a blue cone. And every 50 feet on the right side when I measured with my tape I put an orange cone. I went back to -- it was about 350 - 400 feet and the blue cone's at the 100 foot distance, lined the sleds on the left side of the path.

Q And how did you make a determination of the -- let's say the height of Mr. Burg's eyes while you would have been sitting on that sled so we could try and depict what someone in his position would have seen?

A I sat on it and had others sit on it and then measured from the ground up to where their eyes were.

Q What did you find with regard to your measurements, let's say at 350 feet, and I know you tested both high and low beams so distinguish that for us, please.

A It's a bit of a problem at 350 feet because I was using the ski hill. There was a bit of a slope. I couldn't see up and over 350 feet. The first place I could see was at 330 feet.

Q Okay.

A So when I was at 330 feet back, I could see the reflector on Mr. Zimmermann's sled but it was hard. I would say I couldn't see the reflector on Mr. Leighton's sled at 330 feet back, whether it was high

beam or low beam.

Q And then let's talk about your results as you moved forward from that point as you got closer?

A Yes, sir. At 300 feet I could see both reflectors. But Mr. Zimmermann's reflector was much more distinctive than the reflector on Mr. Leighton's sled, and I could see the reflectors better with high beam than I could with the low beam.

Q And what about -- what was the next distance that you made the measurements from?

A I did 250 and then I did 200.

Q And from both of those points did -- can you tell us what -- how your observations changed with regard to the retroreflectors on either sled?

A On high beam I could see Mr. Zimmermann's reflector. It was very distinct. The reflector on Mr. Leighton's sled could be seen. Again, it wasn't as distinct. And I could see both of the reflectors on high beam or low beam. And they looked about the same in terms of intensity when I was at that distance of 250 and even 200 feet.

Q By 200 feet from where you were positioned, can you tell the jury whether or not you could make out anything in addition to the retroreflectors?

A Yes. I could see the snowmobiles themselves at 200

MR. HARDING: Object, Your Honor. I don't think he's been qualified to render that opinion.

THE COURT: I'll allow it. You can explore it on cross. It goes to its weight.

THE WITNESS: I was asked that question in my deposition, it was 30 miles per hour given the conditions and how a headlight illuminates and the speed.

MR. COOK:

Q And what do you define -- I mean, when you talk about recommended safe speed, what does that definition to you mean?

A From my point of view, it's a speed that you would drive where if some hazard is presented in your visibility, your headlights, or what have you, you can stop or take evasive action so you don't have a collision. And I like to have a safety factor in there; in other words, I'd like to have a cushion, some extra room. I would prefer that you don't just stop within a foot of striking the object but that you have some distance, you'd stop short of the object.

Q Does the presence of a visor over an operator's eyes operating a sled such as Mr. Burg, assuming that it's a clear visor, in your opinion, given a winter nighttime condition, with the weather conditions that were

present on the night of this accident, in your opinion does that aid or detract from an operator's ability to see ahead?

A If it's clear and it's not dirty, it shouldn't do either. If it's dirty obviously it'll hurt. And if you're -- if you have tears in your eyes because the wind is blowing in your face, the absence of a visor would definitely hurt in that circumstance.

Q Given the opinion that you just gave with regard to recommended safe speed and given night operations, would you recommend someone utilize a visor for safe operation in the same or similar circumstances?

A Yes.

Q All the opinions you've given here today, Mr. Skogen, were to a reasonable degree of engineering certainty?

A Yes, sir.

Q One final thing, I marked these, I just wanted to show them so that we can observe them. You took some photographs when you went out and did your survey on August 5 of 1999, correct?

A It was actually August 4, yes.

Q Okay. Exhibit 106, can you come down and show the jury what that depicts, first of all? Are we looking northbound there?

A No, sir, we're looking scuthbound. And there's a turn

/ 00-3258

SUPREME COURT OF WISCONSIN

KARL A. BURG by his legal guardian, GLADYS M. WEICHERT, Plaintiff-Appellant, v. CINCINNATI CASUALTY INSURANCE CO., and ROBERT W. ZIMMERMAN, Defendants-Respondents-Petitioners,	Case No.: 00-3258

Appeal from a Judgment Entered 11/9/00 by The Circuit Court Of Milwaukee County, The Honorable Michael Malmstadt, presiding Case No.: 98-CV-008-875

RESPONSE BRIEF AND APPENDIX OF KARL BERG, PLAINTIFF-APPELLANT

WARSHAFSKY, ROTTER, TARNOFF, REINHARDT & BLOCH, S.C.
Victor C. Harding
State Bar No.: 1001754

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TABLE OF AUTHORITIES

Other Wisconsin Authorities Cited

Other Authorities Cited

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

I. Does the definition of "operate" as used specifically in §350.09 and generally throughout the vehicular statutes §§340 et. seq. require that an engine be running before the laws can apply and/or, more specifically, to this case, was the defendant Zimmerman negligent per se for sitting at the controls of his snowmobile with the keys in the ignition, standing in a commonly used snowmobile track at night with his lights and engine off in violation of §350.09(1) and (3).

ANSWERED BY THE COURT:

Zimmerman was not negligent per se.

ANSWERED BY THE JURY: Zimmerman was not negligent.

ANSWERED BY THE COURT OF APPEALS:

Zimmerman was negligent per se.

STANDARD OF REVIEW: Construction and application of a statute to a particular set of facts are questions of law subject to *de novo* review. *Schunk v. Brown*, 156 Wis.2d 793, 457 N.W.2d 571 (Ct. App. 1990). (Wis. Ct. App. 1990).

II. Was the defendant, Zimmerman, negligent per se for parking and leaving stand his snowmobile along Highway 36 without illuminating his head and tail lamps so his sled could be seen at a minimum distance of 500 feet in violation of §346.51(1)(b).

ANSWERED BY THE TRIAL COURT:

Zimmerman was not negligent per se.

ANSWERED BY THE JURY: Zimmerman was not negligent.

ANSWERED BY THE COURT OF APPEALS: Not addressed.

STANDARD OF REVIEW: Construction and application of a statute to a particular set of facts are questions of law subject to *de novo* review. *Id.*

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and eventual publication of this Court's opinion are both appropriate in this case. The major issues involve the interpretation of statutes as applied to uncontested facts. The question of whether the term "operating" used throughout the moving and intoxicated vehicular use statutes

necessarily requires as an element of proof that the vehicle have a running engine appears to be a recurring question. More often, the issue presents itself in intoxicated use situations. The narrow interpretation of "operator" sought by petitioner will benefit intoxicated users and hamper police enforcement whereas a broad interpretation as sought by Burg will effectuate the intent of the Legislature especially to restrict intoxicated use. Oral argument will assist the justice's focus on the policy issues in order to reach the appropriate decision which will have statewide, if not a national, impact. "Operate" requires "actual physical control." It does not require that an engine be running before a person may be considered "operating" and, therefore, subject to the rules of the road, intoxicated vehicular use and snowmobiling statutes. Further, a published decision definitively answering the question will prevent future uncertainty in intoxicated use situations as well as in such cases as this one.

STATEMENT OF THE CASE

A. Factual Background

The limited facts as stated in the Court of Appeals decision and as relevant to addressing the specific issues are accurate and not in dispute. Karl Burg would offer the following additional facts for purposes of understanding the full background of the situation.

On November 29, 1995 the plaintiff, Karl Burg, and his friend, Robert Dros, decided to go snowmobiling after work. Their path of travel led them parallel to Hwy. 36 between Waterford and Wind Lake in Racine County. At this time Hwy. 36 was under construction, being expanded from two lanes to four lanes with a grass median in between. The two new lanes under construction had reached the point of the flat gravel bed having been laid before winter set in. The concrete pavement had not yet been put down. This stretch of Hwy. 36 under construction was popular with snowmobilers and used by them frequently as it was closed to automobile traffic and nicely level and smooth as a highway. (R62, Transcript, 5/30/00, Robert Dros, pp. 134-138) (R63 Transcript, 5/31/00, Robert Zimmerman, p. 165).

That same evening the defendant, Robert Zimmerman, and his friend, Dean Leighton, also decided to go snowmobiling.

They also traversed the new construction along Hwy. 36 from Waterford north all the way through Wind Lake, turned around and came back going south. (R63, Zimmerman, pp. 163-168). About one-third of a mile south of Malchine Road, Zimmerman and Leighton crossed over the traveled portion of Hwy. 36 to go west on a snowmobile trail over to Lake Tichigan. The trail was not in good shape so the two decided to turn back. They crossed back over the traveled portion of Hwy. 36 to again head south on the new construction. (*Id.* 169-70). Up to this point, they had been snowmobiling for more than one hour, covering at least 14 miles. (R64, Transcript, 6/1/00, Dean Leighton, p. 23) Their intent was to proceed on to snowmobile for an additional indeterminate period of time.

At about the same time Burg and Dros were on the new construction paralleling Hwy. 36 going north from Waterford to Malchine Road. When they reached Malchine Road, they decided, after stopping briefly, to turn around and head back south in their same track. (R62, Transcript, 5/30/00, Dros, pp. 138-39).In the approximate five minute interval that Burg and Dros went to Malchine Road and returned, Zimmerman and Leighton came back from the Tichigan trail and crossed over the

travel portion of Hwy. 36. Zimmerman and Leighton pulled their sleds into the new construction and into the same snowmobile tracks facing south. They decided to stop, turn off their machines and chat while stopped and parked in the middle of the snowmobile tracks. When their snowmobiles were turned off, their head lamps and tail lamps were not illuminated. (R63, Zimmerman, pp. 172-73). They had stopped for about five minutes and were about to turn their engines on and continue snowmobiling when the impact occurred.

After turning around at Malchine Road, Burg and Dros headed back south along Hwy. 36 in the new construction, with Burg approximately 100 to 110 feet out ahead of Dros. They were driving in the snowmobile track at between 35 and 40 mph. (R62, Dros, pp. 140-141). Since they had traversed this same track five minutes before, they were expecting no obstructions. Suddenly Karl Burg was confronted with Zimmerman and Leighton sitting on their snowmobiles in the middle of the track with no lights on. (R63, Zimmerman, pp. 176-184). Burg swerved right in an effort to miss Zimmerman. (R62, Dros, pp. 142-143). Unfortunately his snowmobile collided with Leighton's

sled causing Burg to be thrown approximately 50 feet and in the process losing his helmet. (*Id.* p. 147).

At the time of the incident Zimmerman and Leighton were each operating black snowmobiles. They were each wearing black snowmobile outfits and black helmets. (*Id.* p. 150). The time was approximately 5:30 p.m. and it was pitch black. (*Id.* p. 142).

Karl Burg was found unresponsive at the scene. He was immediately conveyed to Burlington Hospital and immediately thereafter taken by Flight for Life to Froedtert. He was in a coma for three weeks. He required intubation and mechanical ventilation. A ventriculostomy tube was surgically placed into the brain to drain excess fluid. (R63, Transcript, 5/31/00, Dr. Mark Klingbeil, p. 137).

On December 21, 1995 he was conveyed to Sacred Heart Rehabilitation Institute. By this time he could track with his eyes for short periods. He had extensor posturing. He was unable to do anything purposeful with the right side of his body. Gradually over several months, he was re-toilet trained (R64, Transcript, Gladys Weichert (mother), 6/1/00, p. 45); relearned to swallow (*Id.*) and eventually made a remarkable recovery to where he

became ambulatory and could bathe and clothe himself. (R63, Klingbeil, p. 143).

Mr. Burg's past and current medical condition by the time of trial was not disputed. He has permanent residual impairments, both physical and mental. His short term memory is impaired; impaired academic skills; impaired mental flexibility; and left sided fine motor impairment. (R63, Transcript, 5/31/00, Dr. Thomas Hammeke, p. 83). Additionally, he has "regressive behavior" and "social impulsivity" which translates in lay terms to being "child-like" in his manners. He is socially uninhibited such that in any given conversation with a stranger, he might ask inappropriate questions. (R63, Dr. Klingbeil, p. 152). He has left-sided weakness causing a left-sided limp when he becomes tired (R64, Ms. Weichert, pp. 49-50) and his speech is impaired. (R63, Dr. Klingbeil, p. 153). His medical specials were stipulated to be $218,770.00. (R43, Special Verdict).

B. Procedural Background

On January 18, 1999 Karl Burg commenced an action against Robert Zimmerman and Cincinnati Casualty Insurance Company sounding generally in negligence for injuries Karl Burg

sustained in the snowmobile accident. (R1). Zimmerman and Cincinnati generally denied the allegations. (R4).

On June 8, 1999 Karl Burg moved for an order from the Court declaring the defendant, Zimmerman, negligent per se. The motion was based on §350.09(1) Wis. Stats. requiring snowmobilers at night to have their head and tail lamps illuminated. (R15, 16 and 17). Cincinnati filed its brief in opposition to the motion. (R18). Burg filed a reply brief. (R19).

The motion was heard on July 26, 1999. The Court concluded that even though Zimmerman was sitting at the controls of his sled with the keys in the ignition, that since the snowmobile engine was off, he could not be considered as a matter of law as "operating" his snowmobile. (R61, pp. 6-9) (Respondent's Appendix [RA], pp. 100-104). Thus, the Court concluded Zimmerman was not negligent per se as a matter of law. (*Id.* p. 9) (RA 104)

On May 30, 2000 a 12-person jury was commenced to try the facts of this case. On June 1, 2000 during the trial, Burg renewed his motion on negligence per se pursuant to the statutory requirement concerning "operating" at night without headlights. While concluding that he thought the law was

"stupid" and concluding that the issue was crucial to the case and if the trial court were wrong it would clearly be reversible error, the Court nonetheless reiterated its prior holding. (R64, Transcript, 6/1/00, pp. 139-140) (RA 120-21)

Additionally, during trial Burg moved for a ruling that Zimmerman was negligent per se for violating §346.51 Wis. Stats. That law provides that no snowmobile may be parked, stopped or left standing off the roadway of a highway unless it could be seen from 500 feet in each direction along the highway, i.e. head lamps and tail lamps lit. After considering the motion, it was denied. The Court concluded that the statute was a safety statute designed to protect users of the roadway (not users of the highway generally) and that Mr. Burg was not within the protected class and, therefore, Mr. Zimmerman was not negligent per se. (R63, Transcript, 5/31/00, pp. 255-275, specific ruling, pp. 271-274) (RA 113-116)

Lastly, at the close of evidence, both motions were renewed and denied. (R65, 6/2/00, p. 126).

On June 1, 2000 the jury returned a verdict. It found Mr. Zimmerman not negligent with respect to the use of his snowmobile. Damages awarded were as follows:

a.	Past medical (Answered by the Court)	$218,770.00
b.	Past loss of earnings	$ 33,313.00
c.	Future loss of earning capacity	$ 83,750.00
d.	Past pain, suffering, disability	$ 50,833.00
e.	Future pain, suffering and disability	$ 19,583.00

(R43, Special Verdict) (AA 101-3).

Following trial, the plaintiffs moved for a new trial, again seeking that Zimmerman be found negligent per se for violating §§350.09 and 346.51 Wis. Stats. In addition, a new trial was sought in the interest of justice based on the jury's perverse damage award. (R44 and 48). The defendants filed briefs in opposition to the plaintiff's motion for new trial. (R45 and 49). The plaintiffs filed a reply brief. (R50). On August 31, 2000 the Court filed a written decision denying the plaintiff's motion for a new trial. (R52) (RA 122-25)

On September 23, 2000 the Court entered an order for judgment. (R53) On November 9, 2000 the clerk entered judgment. (R56) On November 21, 2000 the plaintiff filed his appeal. (R59)

On September 11, 2001 the Court of Appeals District I reversed. The Court concluded that the term "operate" did not require that an engine be running and, therefore, Mr. Zimmerman was negligent per se for failing to have his lights illuminated. The case was sent back for retrial on all other issues.

ARGUMENT

I. ZIMMERMAN WAS NEGLIGENT PER SE FOR BEING IN VIOLATION OF §350.09(1) AND (3) WHICH REQUIRED HIM, AT THE TIME OF THE ACCIDENT, TO HAVE HIS HEAD LAMPS AND TAIL LAMPS ILLUMINATED AT NIGHT WHILE STOPPED IN A COMMONLY USED SNOWMOBILE TRACK.

Wis. Stats. §350.09(1) and (3) provide in pertinent part:

> (1) Any snowmobile operated during the hours of darkness or operated during daylight hours on any highway right-of-way shall display a lighted headlamp and tail lamp.
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> * * *
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> (3) After February 12, 1970, the tail lamp on a snowmobile must display a red light plainly visible during darkness from a distance of 500 feet to the rear. (Emphasis supplied)

The primary objective when interpreting a statute is to ascertain and give effect to the intent of the Legislature. *Smith v. General Cas. Ins. Co.*, 2000 WI 127, ¶11, 619 N.W.2d 882. To give

effect to the intent of the legislature, the Court must first consider the language of the statute. Statutes should not be read in a vacuum but must be read together in order to best determine their plain and clear meaning. *J. L. W. v. Waukesha County*, 143 Wis.2d 126, 130, 420 N.W.2d 398 (Ct. App. 1988). If the language of the statute as a whole clearly and unambiguously sets forth the legislative intent, we apply that to the case at hand and do not look beyond the statutory language to ascertain its meaning. *State v. Setagord*, 211 Wis.2d 397, 406, 565 N.W.2d 506 (1997). Statutes which appear in the same chapter and assist in implementing the chapter's goals and policies should be read in *pari materia* and harmonized, if possible. *State v. Clausen*, 105 Wis.2d 231, 244, 313 N.W.2d 819 (1982). The cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over construction which will defeat the manifest object of the act. *Milwaukee County v. DILHR*, 80 Wis.2d 445, 453, 259 N.W.2d 118 (1977).

The interpretation and application of §350.09 Stats. is clear. The Legislature wants snowmobilers at night to illuminate their head and tail lamps so other people in the vicinity can see them. This is a safety statute to protect both the operator of the

snowmobile and other vehicles in the neighborhood so they do not collide, causing personal injury. *See e.g. Johnston v. Eschrich*, 263 Wis. 254, 258, 57 N.W.2d 396 (1952); *Parr v. Douglas*, 253 Wis. 311, 318-19, 34 N.W.2d 229 (1948), interpreting similar statutes requiring cars to have their lights on.

The trial court very early in the case on a motion for declaration of negligence per se, erroneously concluded that the statute only applies to snowmobiles that were "operated" at night and that the definition of "operate" required that the engines be running. Since Zimmerman was sitting on his sled at the controls with the key in the ignition, but the engine not running, and the lights off, he was not "operating" his snowmobile at the time of impact. Thus, the Court concluded as a matter of law Zimmerman was not "operating" his snowmobile at night, subjecting him to the statute and, therefore, not negligent per se. (R61, Transcript, 7/26/99, pp. 6-9) (RA 101-104)

Logically, the trial court's decision to make a "running engine" the *sine qua non* for inclusion in the definition of "operate" makes no sense. Had, for example, Zimmerman been sitting in the middle of the snowmobile track with his engine running, but his lights off, everyone agrees he would have been negligent per se. By

turning his engine off, this court would be rewarding Mr. Zimmerman for his misdeed. [1]

Even the trial Court admitted that it did not like its own interpretation of the law and thought it was stupid, but stuck to its decision throughout:

> [I]f the Supreme Court or if the Court of Appeals says I'm wrong and then says it's harmless error, they're goofy. If I'm wrong, this is reversible without a doubt. No question about it. But I don't think I'm wrong, you know. I'm fairly confident I'm right. I don't like the law. I think the law is stupid, but I'm stuck with what the law is.
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> You know, I think when two people park their snowmobiles out there and are sitting around talking about what route they're going to take, it's hard for me to comprehend how the law can say that's not operating, but it does.

R64, Transcript, 6/1/00, p. 140. (RA 121).

Wis. Stat. § 350.01(9r) provides the following definition for "operate" with regard to a snowmobile.

> "Operate" means the exercise of physical control over the speed or direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion. (Emphasis supplied)

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[1] Zimmerman's sled happened to have the feature that when the snowmobile engine was off, the lights went off and when the engine was on, the lights were on. This feature, however, is not ubiquitous with all snowmobiles, such that on some sleds, the operator is able to turn the lights on when the engine is off and vice versa. (R63, Transcript, 5/31/00, Dennis Skogen [the defendant's accident reconstruction expert], p. 276)

The definition to "operate" a snowmobile is the same as combining the definition of "drive" and "operate" for motor vehicles while under the influence:

> "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.
>
> "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

See both §346.63(3)(a) and (b) and §343.305(1)(b) and (c).

The definition of an "operator" under the motor vehicle statute is "a person who drives or is in actual physical control of a vehicle." (Emphasis supplied) Wis. Stat. §340.01(41). [2] The definition of "operator" of a snowmobile is even broader, as it includes not only a person who "operates" a snowmobile, but also a person "responsible" for the operation or "supervising" the operation. Wis. Stat. § 350.01(9w).

Except for substituting the word "snowmobile," for the words "motor vehicle," these definitions of "operate" and "operator" are virtually identical.

Had the Legislature wished to make a running engine the defining element for "operating", it could have done so. It could

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[2] The definitions in § 340.01 at times apply to snowmobiles as those terms are picked up in Chapter 346 Rules of the Road (§ 346.01), and numerous sections in Chapter 346 apply to snowmobiles per § 346.02(10), infra.

have defined "operating" for a motor vehicle to be when the engine was "on." Non-operation, therefore, would be when the engine was off. The statute would be clear, unambiguous, defining and there would be no question as to who was operating or not operating a motorized vehicle. The Legislature, however, chose not to use such a narrow definition, choosing instead a broader definition including those in "actual physical control" of a vehicle. Presumably the Legislature felt that this definition would more appropriately effectuate its intent.

The Court of Appeals dissent, relied on by Cincinnati and Zimmerman, argues that the majority is "contorting" the language of the statute to bring Zimmerman within its grasp. The dissent questions the "stopping point" of the definition if a running engine is not the deciding factor and gives examples which would press the envelope. First, no matter what definition may be adopted, one can always find factual situations which may inevitably fray the edges of the definition. The examples cited, however, would certainly have no bearing on this case since Zimmerman was in actual physical control of the sled with the keys in the ignition and his hands on the controls, ready to move at any moment.

Secondly, the dissent fails to consider the ramifications of its interpretation and the very bad precedent that would be established. By example, assume an officer observes a person stumbling from a bar and approaching his vehicle parked in the street. Up until the point that the person opens the car door to get in, that person has the choice to turn around, leave the car behind and call a cab. However, once that person enters the vehicle with the keys for it in his possession, he is now in "actual physical control" with the immediate capability of putting the vehicle in motion. Accordingly, he would be subject to arrest. If this Court follows the view that an engine must be running before a car can be operated, then the police officer would have to wait for the individual to start the engine before making the arrest. One has only to watch the nightly TV shows of videotaped police chases to understand how dangerous a precedent this would set. Criminals and intoxicated drivers are usually the ones that attempt to flee the police. Fleeing drivers usually kill and maim others, never themselves! By forcing the police to wait for the engine to be started before arrest can be made only puts 4,000 lbs. of steel more readily available for movement in the hands of an intoxicated user. The police, pedestrians and other operators would be placed at

substantially more risk. Such an interpretation would not effectuate the intent of the Legislature and would establish a very poor precedent.

In the intoxicated use statutes referred to above, as well as the snowmobile statute, the operator is a person in "actual physical control" capable of physical manipulation or activation of the controls necessary to put the snowmobile (motor vehicle) in motion. Wisconsin case law illustrates what it means to be in "actual physical control" of a vehicle. Because the definition of "operate" is the same for a vehicle as it is for a snowmobile, the case law discussing what "operate" means for a vehicle would also apply to what "operate" means for a snowmobile.

Cases arising under Wisconsin Statute §343.305(1)(c), the driving while intoxicated statute, are the most illuminating as to what "operate" actually means.

For example, the defendant in *Milwaukee County v. Proegler*, 95 Wis. 2d 614, 626, 291 N.W.2d 608, 613 (Ct. App. 1980) was found intoxicated, sleeping in his car with the motor running on the side of a highway. Proegler argued that his conduct did not fall within the statutory definition of "operate" since he was asleep, exercising

no conscious volition with regard to the vehicle, and the vehicle was motionless. *Id.* at 627.

The court in *Proegler* found that although at the exact moment Proegler was apprehended he was exercising no conscious control with regard to the vehicle, he nonetheless had "actual physical control" of the vehicle. He was found to be in control, although the manner in which such control was exercised resulted in the vehicle remaining motionless. *Id.* The court went on to hold:

> [R]estraining the movement of a running vehicle constitutes physical manipulation of controls of a vehicle which falls within the scope of our statute. Thus, one could have "actual physical control" while merely parking or standing still so long as one was keeping the car in restraint or in position to regulate its movements. (Emphasis supplied)

Id at 627-28.

It would make no substantial difference to the *Proegler* decision whether the engine was running or not, especially since *Proegler* was asleep.

More recently, Wisconsin courts reiterated the *Proegler* findings in *State v. Modory*, 204 Wis.2d 538, 555 N.W.2d 399 (Ct. App. 1996). When the police found Modory, his truck was stuck on a mound of dirt with the wheels spinning and barely touching

the ground. The state charged Modory with operating a vehicle while intoxicated. The court agreed with the *Proegler* decision that the definition of operate did not require movement. They held the definition of "operate" in the statute "requires that the defendant physically manipulate or activate any of the controls necessary to put the motor vehicle in motion," and therefore, Modory was operating the vehicle. *Id.*

Although *Modory* and *Proegler* both involved situations where the engine was running, neither case imposes that factual requirement to the definition of "operate." *Modory*, 204 Wis.2d at 538, *Proegler*, 95 Wis.2d at 614. Both cases define "actual physical control" to mean sitting behind the wheel of a vehicle with the capacity to manipulate the controls. Neither case necessitates a finding that an engine of a vehicle must be running in order to meet the definition of "operate."

Wisconsin has two unpublished decisions that deal specifically with running engines as not being a requirement to find that a person is "operating" his vehicle. (These cases were originally cited in Plaintiff's Response to Cincinnati and Zimmerman's Petition for Review and Appendix, pp. 111-116 for the proposition that the statute establishing the criteria not to publish

countered the defendant's putative criteria for this Court accepting the petition.) Unpublished decisions have no precedential value or authoritative effect. The cases are being offered here to advise the Court of their existence. *State of Wisconsin v. Wolford*, 230 Wis.2d 749, 604 N.W.2d 35, 1999 WL733822 (Wis. App.) and *State of Wisconsin v. Seese*, 218 Wis.2d 832, 581 N.W.2d 595, 1998 WL146495 (Wis. App.) [3]

Although Wisconsin has no published opinions on point, there are several out-of-state cases that directly articulate the finding that "operate" does not require a running engine. The Supreme Court of Ohio has discussed the term "actual physical control" as used for the definition of "operate" under the driving while intoxicated statue. See *City of Cincinnati v. Kelley*, 351 N.E.2d 85 (Ohio 1976) (RA 126-29) The Court held being in actual physical control of a vehicle requires that the person be "in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that the person is capable of starting the engine and causing the vehicle to move."

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[3] "I have read appellate briefs with citations to unpublished opinions, and I have never thought that this rule (809.23(3)) was violated, so long as the author has flagged that it is unpublished opinion and that it is not promoted as binding precedent." Honorable Neal Nettesheim Court of Appeals, District II, Wisconsin Opinions July 19, 2000, Vol. 14, No. 29.

Kelley, 351 N.E.2d at 87-88. Again, a running engine is not a prerequisite to the definition of "operate."

In *State of North Dakota v. Gerald A. Ghylin*, 250 N.W.2d 252 (Sup. Ct. N.D. 1977) (RA 130-34) the defendant, Ghylin, sought to avoid an operating while under the influence violation by asserting that when he was arrested, his car was in the ditch with the engine off. Thus, he argued that he was not in actual physical control of the vehicle and, therefore, could not be "operating" while under the influence. The Court concluded that it did not matter that the engine was not running:

> He (defendant Ghylin) contends that in the instant case the ignition was off and the transmission was not engaged.
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> The definition of "actual physical control" does not rest on such fine distinctions. The Court, in *Commonwealth v. Kloch*, (citation omitted), defined the phrase in these terms:
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> > A driver has 'actual physical control' of his car when he has real (not hypothetical) bodily restraining or directing influence over, or domination and regulation of, its movements of machinery. * * *
> >
> > It is not dispositive that appellant's car was not moving, and that appellant was not making an effort to move it, when the troopers arrived. A driver may be in 'actual physical control' of his car and, therefore, 'operating' it while it is parked or merely standing still 'so long as [the driver is] keeping the car in restraint or in position to regulate its movements. Preventing a car from moving is as much control and dominion as actually putting the car in motion on the highway. Could one exercise any more regulation over a thing, while bodily present, than prevention of

> movement or curbing movement.' (citation omitted) (emphasis supplied)

Id. pp. 254-255 (RA 132)

Similarly, in *Hughes v. State of Oklahoma*, the Court of Appeals of Oklahoma held that the engine of a vehicle did not have to be running in order to meet the definition of "operate." *Hughes v. State of Oklahoma*, 535 P.2d 1023 (Okla. 1975) (RA 135-36). The Court found that where a defendant was behind the wheel of a car and could have at any time started it and driven away, he had "actual physical control" of the vehicle within the statute defining "operate." *Hughes*, 535 P.2d at 1024. (RA 136)

Contrary to Cincinnati and Zimmerman's argument, Zimmerman was exercising "actual physical control" over his sled at the time of impact. He had actual physical control of the direction of his snowmobile, i.e. he had just stopped it facing south in the middle of the snowmobile tracks. He had actual physical control of the speed of his sled, i.e. zero miles per hour. Notwithstanding these facts, he was in actual physical control of the "controls necessary to put it in motion," i.e. he was sitting on the sled with the key in the ignition, about ready to pull the rope to leave. Under any definition of "operate" during the

continuance of his snowmobile journey, Mr. Zimmerman was operating his snowmobile at the time of the impact.

The driving while intoxicated statues defining "operate" in Ohio, North Dakota and Oklahoma are virtually identical to the definition of "operate" used in the Wisconsin Statutes. In Wisconsin, the definition for "operate" is identical for the snowmobile statute, the motor vehicle statute, and the driving while intoxicated statute and must be read in *pari materia*. The driving while intoxicated case law that explains what "operate" means would also apply to the motor vehicle and the snowmobile definition of "operate."

The trial court, in denying the plaintiff's motion for a new trial, discounted the *Proegler* and *Modory* decisions and concluded that the definition of "operate":

> . . . is defined much more broadly in operating while intoxicated cases for reasons of public policy. This is a matter of legislative intent in formulating strict drunk driving laws. Because there was no evidence at trial that any of the parties (Burg and Zimmerman) were intoxicated, the definition of "operate" in *Progeler,* and *Modory*, is not applicable in the present case.

(R52, Trial Court Decision, 8/31/00, p. 3((RA 124).

The trial court's conclusion about interpreting civil versus criminal statutes is backwards. We as Americans cherish our

freedom. Before we take away a person's freedom, our laws demand a narrow and strict construction so it is clear to a citizen when they have crossed the line between right and wrong. We do not put people in jail based upon some vague discipline. Therefore, a maxim of criminal law is that criminal statutes are construed strictly so as to afford notice to a person how to conform their actions and what criminal laws prohibit. *See e.g. State v. Manthey*, 169 W.2d 673, 686, 487 N.W.2d 44 (Wis. Ct. App. 1992). Accordingly, when the term "operate" has been construed in the criminal arena to include a person sitting at the controls of a vehicle with the key in the ignition but the engine off, then that interpretation in the civil arena would be at least as broad, if not broader, to effectuate the intent of the Legislature.

Further, to somehow argue that "operate" has a different meaning in the intoxicated use statutes is implausible. Under such a theory, had Zimmerman been intoxicated while sitting on his sled with the engine and lights off, he could have been charged for OWI and presumably negligent per se for his lights being off but since he was sober, he was not negligent per se for having his lights off. This makes no sense. Drunk or sober should not change the definition of "operate." If a person can go to jail for being

intoxicated while sitting behind the controls of a car with the engine off, i.e. operating while under the influence, then "operating" a snowmobile as defined and used in the civil arena certainly would include a person at the controls of a sled with the key in the ignition out in the middle of a commonly used snowmobile track at night with the engine and lights off.

The definition of "operator" for an intoxicated snowmobiler is the same as that for an automobile driver:

> No person may drive or operate a motor vehicle while:
> (a) under the influence of an intoxicant,...

Wis. Stats. §346.63(1)

Virtually the identical rule applies to snowmobilers:

> No person may engage in the operation of a snowmobile while under the influence of an intoxicant...

Wis. Stats. §350.101(1)

The unsafe conduct and hazards created by an intoxicated snowmobiler versus an automobile driver are the same. Drunks can kill and maim others equally as well with a snowmobile as a car. Likewise, people can cripple and maim others at night when they operate their equipment without lights.

Additionally, the term "operate," has been broadly construed when referring to motor vehicles to encompass any act

in or about a vehicle incident to the continuance of the journey. By example in *Merklein v. Indemnity Ins. Co. of North America*, 214 Wis. 23, 252 N.W. 280 (1934), the plaintiff ran over a log that had fallen across the street. A wrecker was employed to pull the car off the log. The plaintiff was standing outside of the car pushing and steadying his car when the car skidded upon the log, knocking the plaintiff to the ground. The plaintiff sustained a broken ankle. The trial court was called upon to define the term "operating" and held:

> ". . . The operation of an automobile necessarily implies doing all that is necessary to be done to successfully move the same from place to place, and when the plaintiff became stalled during the course of his automobile journey, any act of the plaintiff in or about his automobile, necessarily required or necessarily incident to the continuance of the automobile journey, would in the opinion of this (the trial) court come within the scope of 'operating' the automobile," and that the injury occurred while the plaintiff was "operating" his automobile.
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> * * *
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> A person injured while on the road repairing a punctured tire was held to be within the terms "operating, driving, riding in or on" an automobile (citation omitted)
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> A person who took the driver's seat of an automobile preparatory to starting who was accidentally shot by his companion who was taking a gun apart at the side of the car, was held covered by the phrase "operating, driving (or) riding in" an automobile. (Citations omitted)
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> * * *
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> The word "operating" covers an injury sustained while alighting from an automobile. (Citation omitted)

Id. pp. 25-26.

The Legislature was well aware of this liberal construction of the term "operate" from the common law when it incorporated the term in the vehicular use statutes.

The "Rules of the Road" set forth in Chapter 346 adopt the words and phrases in §340.01. Under §346.02(10) "the operator of a snowmobile upon a roadway shall in addition to the provisions of Chapter 350 be subject to . . . (over 30 sections of rules of the road are identified)." The term "operate" and/or "operator" in those listed sections is not intended to have a different meaning when applying them to snowmobiles as opposed to motor vehicles.

For virtually every object that man can operate by placing in motion, Wisconsin requires the operator at night to illuminate the object. *See, e.g.*, Wis. Stat. §347.245 regarding slow-moving vehicles; §347.24 regarding non-motor vehicles; §347.22 regarding tractors; §30.61(1) regarding motorboats; §30.61(5) regarding sailboats and rowboats; §30.61(6) regarding moored or anchored boats. These are all safety statutes intended to protect other operators who may be in the vicinity to alert them of another's presence.

By example, assume an Amish buggy driver temporarily stopped his buggy in the middle of the roadway of a highway at night and tied up the reins. Assume that an automobile driver at the last minute saw the buggy and drove off the road killing himself. Assume further that the buggy "operator" had no rear reflector as required by §347.245 Stats. Would this Court countenance the defense that this section would not apply because the driver was not "operating" the buggy at the time of the precise impact? Would it arguably make a difference whether the horse was asleep or awake at the time? The questions are rhetorical with the answer made obvious by virtue of the fact that the buggy driver had actual physical control of the buggy necessary to put it in motion.

There is no difference for headlights and tail lamps for cars at night. Vehicles operated at night must have lights to alert other operators in the vicinity of their presence. *See e.g.* §§347.13 and 347.09. The conduct to be avoided and the hazards created for automobiles, snowmobiles or any other moveable object at night are identical. These are safety statutes to protect people requiring broad, not narrow, interpretations to give affect to the Legislature's intent.

The Legislature's intent by enacting §350.09(1) and (3) is clear. When you operate your snowmobile at night on commonly used snowmobile trails, you leave the lights on so other people can see you. Cincinnati and Zimmerman can cite no authority anywhere in this country to support their theory that an engine must be running before a person can be considered "operating" a motorized vehicle.

Robert Zimmerman stopped his snowmobile at night right in the middle of what he knew to be a commonly used snowmobile track. His intent was to stop briefly and then move on. He turned the engine off which, in turn, turned off the lights. He did this in order to chat with his friend, Dean Leighton who, likewise, turned off his lights and engine. They had been snowmobiling for miles up to this point with the intent of starting up their engines to continue on snowmobiling. It was pitch black outside with Mr. Zimmerman and Mr. Leighton wearing black helmets and black leather snowmobile outfits, riding black snowmobiles. This set a trap for Karl Burg who happened to be traveling in the same track and could not see the parked sleds in time to save himself. He swerved to miss

Zimmerman but, unfortunately, could not veer enough to miss Leighton.

Robert Zimmerman was negligent per se for violating §350.09(1) and (3).

II. ZIMMERMAN WAS NEGLIGENT PER SE FOR STOPPING AND LEAVING STAND HIS SNOWMOBILE ALONG HIGHWAY 36 SUCH THAT IT COULD NOT BE SEEN BY OTHER OPERATORS FROM A DISTANCE OF 500 FEET ALONG SUCH HIGHWAY IN VIOLATION OF §346.51.

Wisconsin Chapter 346 deals with rules of the road. The entire chapter applies generally to motor vehicles. The Legislature, however, specifically adopted a number of sections and made them applicable to snowmobiles:

> The operator of a snowmobile upon a roadway shall, in addition to the provisions of Chapter 350, be subject to ss. . . . 346.51 . . . .

§346.02(10).

Over 30 sections of Rules of the Road are incorporated and made applicable to snowmobiles.

One such statute specifically made applicable to snowmobiles, provides in pertinent part:

> No person shall park, stop or leave standing any vehicle, whether attended or unattended, upon the roadway of any highway outside a business or residence district when it is practical to park, stop or leave such vehicle standing off the roadway, but even the parking, stopping or standing of a vehicle (snowmobile) off the road of such highway is unlawful unless the following requirements are met:
>
> * * *
>
> (b) Such standing vehicle must be capable of being seen by operators of other vehicles from a distance of 500 feet in each direction along such highway. (Emphasis supplied)

Wis. Stats. §346.51

The terms "highway" and "roadway" are defined in pertinent part in §340.01(22) and (54) respectively as follows:

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel.
>
> * * *
>
> (54) "Roadway" means that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the bearm or shoulder. In a divided highway the term "roadway" refers to each roadway separately but not to all such roadways collectively.

Essentially, the "roadway" of Highway 36 is the concrete portion for cars and the "highway" refers to everything else between the easement boundaries open for travel. This was described by Officer Gary T. Gage of the Racine County Sheriff's Department and DNR Warden Russell Fell. The Sheriff's

Department has jurisdiction over highways and the DNR has jurisdiction over snowmobiles outside of the highway area. (R62, Transcript, 5/30/00, Officer Gary Gage, pp. 196-197) (R64, Transcript, 6/1/00, Conservation Warden Russell T. Fell, p. 131-32)

The courts in Wisconsin have always broadly construed the definition of "highway." *See Lange v. Tumm,* 2000 WI 160, ¶ 7, 615 N.W.2d 187.

> Under this section the term "highway" is a broader term than "roadway" and it includes at least such portions of the space dedicated for use as a public highway as are open to the use by the public as a matter of right for vehicular traffic. No doubt, where there is an established curb line, and the space between this and the property line is maintained as a lawn or garden, the portion so maintained is not open to the public for vehicular travel. But where a portion of the highway between the roadway and the property line is paved and is available for vehicular travel, this is certainly a part of the highway. (Emphasis supplied)

Poyer v. State, 240 Wis. 337, 340, 3 N.W.2d 369 (1942)

More recently the definition of "highway" was interpreted expansively to include the entire way open to the public between "boundary lines." *In interest of E. J. H.*, 112 Wis.2d 439, 441-42, 334 N.W.2d 77 (1983). *See also Heise v. Village of Pewaukee*, 92 Wis.2d 333, 348, 285 N.W.2d 859 (1979).

This statute became relevant during the cross examination of the defendant's expert accident reconstructionist, Mr. Dennis

Skogen. Mr. Skogen had done some field tests at night with sleds similar to those operated by Zimmerman, Leighton and Burg to determine how far back their reflectors could be seen by an oncoming snowmobile. At roughly 330 feet, Mr. Skogen could not see the Leighton reflector and could only faintly see the Zimmerman reflector. (R63, Transcript, 5/31/00, Dennis Skogen, p. 240, 241). It was Mr. Skogen's opinion, therefore, that it was not unreasonable for Mr. Leighton and Mr. Zimmerman to stop in the middle of the snowmobile track with their lights out because their reflectors could be seen from 300-350 feet which represented a reasonable margin of error for another snowmobiler to be alerted to their existence. (*Id.* pp. 250-52) (RA 108-110). Mr. Skogen opined further that it would be unreasonable, for instance, if Mr. Leighton and Mr. Zimmerman had stopped their sleds across the tracks (90° turn) because their reflectors would not then be facing oncoming traffic. (*Id.* p. 252-54) (RA 110-12) At this point the statute requiring snowmobiles to be seen at 500 feet was brought to the attention of the Court for purposes of cross examining Mr. Skogen. The Legislature already adopted the reasonable margin of error, i.e. 500 feet. Additionally, the plaintiff moved for a

finding of negligence per se for a violation of the statute. (*Id.* pp. 253-71) Ultimately, the Court concluded that the statute was a safety statute directed to protect travelers on the "roadway." Since Mr. Burg was not within this class of protected people, it was not negligence per se. (*Id.* pp. 271-274) (RA 113-16)

First, the Court was correct in concluding that Wis. Stats. §346.51 is a safety statute and its violation is negligence per se. *Milwaukee and Suburban Transport Corp. v. Royal Transit Co.*, 29 Wis.2d 620, 139 N.W.2d 595 (1966). Second, the Court's narrow interpretation that the safety statute was designed only to protect users of the "roadway" was wrong. The statute itself defines who should be able to see a stopped vehicle at 500 feet. The standing vehicle must be capable of being seen by other operators from 500 feet along such "highway." §346.51(1)(b). To restrict protection only to users of the "roadway" makes no sense since those users who stay on the roadway cannot hit someone off the roadway but on the highway right of way.

Just before stopping on the new construction, Zimmerman and Leighton had crossed over the travel portions of Hwy. 36, i.e. the "roadway." (R. 63, Transcript, 5/31/00, Robert Zimmerman, pp. 171-172) This maneuver to operate a

snowmobile on and across a roadway is specifically provided for in §350.02(2)(a)(1). This same section, specifically §350.02(6)(b)(1) and (2) permits snowmobilers to use highways outside of the roadway area. In any event, when snowmobiles use the roadways and highways, the Legislature specifically identified a number of rules of the road they must follow. One such rule specifically adopted in §346.02(10) is the rule with respect to stopping, standing or parking your snowmobile along a highway, i.e. §346.51. That section could not be more clear in requiring that a stopped snowmobile off the roadway of such highway must be capable of being seen from 500 feet in each direction along the highway. This is the same distance minimally required for tail lamps to be capable of being seen in the dark pursuant to Wis. Stats.. §350.09(3). Without his tail lamp lit, Zimmerman could not be seen at 500 feet, much less even at 350 feet. This is the safe distance the Legislature adopted establishing a reasonable margin of error to enable a person to observe, react and stop/avoid.

This new construction being laid down in the highway right of way along the "roadway" of State Hwy. 36 was open to snowmobilers and commonly used by them. Mr. Zimmerman

stopped his snowmobile right in the middle of the snowmobile track right in the middle of the new highway and turned off his lights. He could not be seen from 350 feet. He did this without any regard for other snowmobilers:

> Q: You were in snowmobile tracks on a highway right of way, correct?
> A: Correct.
> Q: And you pulled into those tracks to go south, correct?
> A: Correct.
> Q: You did not pull over to the right edge, correct?
> A: Correct.
> Q: Now, as you were sitting there talking with your lights out, in a commonly used snowmobile track on a highway right of way, it didn't even concern you that other snowmobilers using that same track wouldn't be able to see you.
> A: No, it didn't concern me.
> Q: It never even crossed your mind that other people wouldn't be able to see you out there when it's dark, it's black, it's overcast, and you're sitting there right in the middle of the track with no lights on?
> A: No, it didn't concern me.

(R63, 5/31/00, Zimmerman, pp. 183-184) (RA 106-107).

Mr. Zimmerman was negligent per se for violating §346.51(1)(b).

CONCLUSION

For the reasons set forth above, the Supreme Court should affirm the decision by the Court of Appeals District I finding Mr. Zimmerman negligent per se for violating Wis. Stats. §350.09(1) and (3) and remanding the balance of the case for a

new trial. Alternatively, this Court should find that Mr. Zimmerman was negligent per se for violating §346.51 Stats.

DATED: January 15, 2002.

RESPECTFULLY SUMITTED

WARSHAFSKY, ROTTER, TARNOFF, REINHARDT & BLOCH, S.C.

BY: _____
Victor C. Harding
State Bar No.: 1001754

:kla

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 36 pages and the word count for the body of the brief is 7,374.

Dated: January 15, 2002

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INDEX TO APPENDIX

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

KARL A. BURG by his legal guardian,
GLADYS M. WEICHERT,

PLAINTIFFS,

VS. CASE NO. 98-CV-008875

CINCINNATI CASUALTY INSURANCE CO.,
and ROBERT W. ZIMMERMAN,

DEFENDANTS.

July 26, 1999 HON. MICHAEL MALMSTADT,
Circuit Court Judge Presiding

A P P E A R A N C E S

VICTOR HARDING appeared on behalf of the Plaintiffs.

GREGORY COOK appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

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they did knowing that other snowmobiles might come across in this area. This is a 60 foot wide area that we are talking about here. There are two lanes plus side lanes.

More importantly, I think this statute does not mean that if you are on a snowmobile at night with it turned off and you are sitting on it that you are indeed operating it. Therefore, I think the motion should be denied.

MR. HARDING: Very briefly, Your Honor.

The defendant is complaining that because you turn off your engine your lights automatically go off and that shouldn't be that way. If they want to bring Polaris into the case, they are welcome to do that. That is not an issue before the Court. I think if you are sitting on a snowmobile at night, the law requires that you have your headlights be on. That is where the issue will lie.

THE COURT: I was unable to find any specific definition that applies to operation of snowmobiles. There are all kinds of definitions that apply to operation of vehicles. Those definitions primarily come from the drunk driving realm where people are found in their

cars under certain circumstances and alleged to be operating a parked vehicle while the motor is running. If there is a parked vehicle without the engine running, generally speaking you are not operating.

What I was looking at just now, it I may not be analogous but I think it is close, and that is the regulation concerning boats. When you are in a motor boat, when you are stopped in the water, you are required to show a light. When you are operating a row boat at night or a sailboat at night, you are not required to show a light. You are required, however, to have one that can be shown when approaching water craft is in the area.

If the legislature wanted to require people who stop and park somewhere with a snowmobile to have a light on it when it is stopped, they could have said so. They have said so with other vehicles such as boats. I don't believe they have said so with snowmobiles. This accident shows a good reason why they should. As I understand it, this was Loomis Road, Highway 36, while it was under construction and people were using it as kind of like a super

highway for snowmobiles, which is understandable. You see it all the time along construction roads.

I guess there is no dispute that Mr. Zimmerman stopped his snowmobile and was sitting on it talking to another guy who also had a snowmobile, and they were sitting there. Sitting on it I don't believe under the law is operating it.

I was not aware of what counsel said, but if that is accurate that the lights are on when it was running, the only way that I can envision that you would be required to have lights on it when the engine isn't running is if you were towing it. That would be operating it just like towing an automobile is operating it. You are using some of the mechanisms required to be put in place to operate it. In other words, you have a steering handle and you can be steering. Sitting on a towed snowmobile in my view would be operating it and I suppose you better put a light on it. If the engine isn't running and you are not moving and just sitting on it, under the law I don't believe that entails operation. Based upon that view the motion for finding that

Mr. Zimmerman was negligent per se for sitting there with his headlights off is denied.

MR. COOK: I will prepare an order.

MR. HARDING: So there is no issue of fact, you are ruling, as a matter of law, that he is not operating the snowmobile?

THE COURT: Right.

MR. HARDING: Okay.

THE COURT: Clearly, if he was operating he has got to have his light on.

*****

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

KARL A. BURG, et al,

Plaintiffs,

-vs- CASE NO. 98-CV-008875

CINCINNATI CASUALTY INSURANCE, et al

Defendants.

- -

May 31, 2000

Before the HONORABLE MICHAEL MALMSTADT,

Circuit Court Judge, presiding.

JURY TRIAL - PART II of IV

A P P E A R A N C E S :

VICTOR C. HARDING, Attorney at Law, appeared on behalf of the plaintiffs.

GREGORY J. COOK, Attorney at Law, appeared on behalf of the defendants.

Donna J. Richmond, Court Reporter

Q What do we call this, Mr. Zimmermann? You're a snowmobiler.

THE COURT: No, we're not going to go there. *Trail* is a term of law in some points here.

MR. HARDING:

Q Okay, this is a highway then. This is -- you're on a highway. This is the highway right-of-way going through here, correct?

THE COURT: Now we might have gotten to the point it's a highway right-of-way. At the time it was not a highway.

MR. HARDING: That's fair.

MR. HARDING:

Q This is the highway right-of-way, right?

A Correct.

Q And -- strike that. You were in snowmobile tracks on a highway right-of-way, correct?

A Correct.

Q And you pulled into those tracks to go south, correct?

A Correct.

Q You did not pull over to the right edge, correct?

A Correct.

Q Now, as you were sitting there talking with your lights out, in a commonly used snowmobile track on a highway right-of-way, it didn't even concern you that other

snowmobilers using that same track wouldn't be able to see you?

A No, it didn't concern me.

Q It never even crossed your mind that other people wouldn't be able to see you out there when it's dark, it's black, it's overcast, and you're sitting there right in the middle of the track with no lights on?

A No, it didn't concern me.

Q Hypothetically -- strike that. You ostensibly stopped to talk to Mr. Leighton, right?

A Yes.

Q Why is it that you didn't pull up side by side like you originally indicated that you actually were? He was almost a snowmobile ahead of you on the right?

A I pulled right up next to him.

Q Are you saying that the physical evidence that was determined at the site was wrong?

A I believe so.

Q Okay. Now, what did you talk about?

A Probably how the sleds were running because they were new.

Q Okay. You asked him how the sled was going?

A Yes.

Q And what did he say?

A It was running probably good.

A And the government.
Q And they put down a speed limit of 35, and the law says that you can't go any faster than 35?
A That's right.
Q You go faster than 35 it's not reasonable?
A That would be.
Q That's what the law is saying?
A That's what the argument is, yes.
Q It's not argument, that's what the law is, going faster than 35 is considered not reasonable?
A I'll take your word for it, yes.
Q Okay. It says you can go 20 but you can't go faster than 35?
A You can't go 20 in some circumstances either even.
Q There's minimum speed, I agree with you. But all I'm saying is the law sets a limit on the topside?
A Absolutely, yes, sir.
Q Okay. Now, I think your testimony is that -- I took your deposition. You indicated that Mr. Leighton and Mr. Zimmermann -- was reasonable for them to stop out there in this track with their lights off?
A I didn't have a criticism or problem with them stopping there is what I said.
Q Therefore, you considered that to be reasonable?
A It's acceptable. There's a whole line of questions

and answers I gave in that respect.

Q I understand. But you recall I used the term *reasonable*. You agreed with me; you said it was reasonable?

A I said it was not unreasonable. That's a little bit of a difference. It's not something that I necessarily encourage people to do at all times.

Q And let's back up for a second. If on the night in question Mr. Zimmermann and Leighton had pulled straight into this track and were laying across the track instead of facing this direction, but facing this direction, would that have been reasonable?

MR. COOK: Objection, relevance. We don't have any facts to establish that.

MR. HARDING: Judge, I'm testing his knowledge of reasonableness.

THE COURT: We're going to do this for a little bit, but I don't see a whole lot of probative value to this.

Do you understand the question?

THE WITNESS: I think I do, Your Honor.

THE COURT: In other words, if the vehicles were parked butt to nose and they were perpendicular to the roadway instead of parallel to the roadway.

THE WITNESS: And their lights were off.

MR. HARDING:

Q Yes.

A And they were across --

Q Across the tracks.

A Across the tracks. I would be critical. I'd say that's unreasonable.

Q And why is that?

A Because now you're not presenting the reflector with a surface to oncoming traffic.

Q Okay. So it's the fact of the retroreflector that can be seen out maybe 300, 350, even 400 feet, that's what makes it reasonable for them to stop and turn their lights off?

A Well, the action itself is acceptable to me in that circumstance. But the reflectors make it not unreasonable as I answered a minute ago.

Q Okay. And you consider, therefore, that to be a reasonable margin of safety. You talked about margins of safety when you discussed the speed limit of 30 miles per hour being reasonable. That had a -- because when you're going 30 miles an hour, you can stop, according to your calculations, in roughly 110 feet?

A 111 at the most, yes.

Q Okay. But you can see these retroreflectors as you

indicated out 300 feet, correct?

A True.

Q So what you've done by saying 30 miles per hour, which would be three times less than what you can see out ahead, that in your opinion sets a reasonable margin of error or a margin of safety?

A It's a margin of safety. And I try to err -- if I'm going to err, if I can use that word, err on the high side.

Q Isn't it reasonable and don't the rules direct that snowmobiles be seen 500 feet to the rear?

A I don't know what the law is in that sense.

Q Well, let's look at the law.

MR. COOK: I'm going to object. I don't know where he's going with this. But if he's talking about the law, that's something that we'll have to discuss. Relevance.

THE COURT: Sustained at this point.

MR. HARDING: Well, I'm not sure --

THE COURT: What you're proffering -- you're supposed to proffer the evidence. You tell me why.

MR. HARDING: I'm testing his knowledge that the *reasonable* requires that the snowmobile be seen from 500 feet.

THE COURT: Based on what? Show me.

MR. HARDING: Based on the law.

THE COURT: Well, you show me it. Let's go back and ask the question, then I'll rule on it.

MR. HARDING:

Q Well, are you aware that snowmobiles operated at night are required to have their head lamps and tail lamps illuminated?

A I don't know about a law, but it makes sense to me if you're in motion and operating.

THE COURT: Then the answer to the question is no, you're not aware of that?

THE WITNESS: No.

THE COURT: Thank you.

MR. HARDING:

Q I'm going to show you Section 350.09 of the Wisconsin Statutes that refers to snowmobiles.

MR. COOK: Your Honor, he's putting it on the screen. I'm objecting.

THE COURT: Sustained at this point.

MR. HARDING: Well, I can't go forward at this point, Your Honor, without that ruling. And I --

THE COURT: Okay. Ladies and gentlemen, I want you to go upstairs for awhile. Don't talk about the case.

(Jurors excused.)

This is your brief.

MR. COOK: Well --

THE COURT: Okay. At this point if 346.51 applies, what we're saying is that someone who stops any vehicle, no matter what kind of vehicle it is, off the roadway, it must be visible 500 feet back no matter where it's parked.

MR. HARDING: Correct.

THE COURT: I don't agree with that. Off the roadway means off the roadway adjacent to the highway. It doesn't -- where was -- where was this snowmobile stopped in relation to the roadway?

MR. HARDING: Off the roadway.

THE COURT: Fine. In this safety fact, this statute is to protect who? Who is 346.51?

MR. HARDING: Vehicles.

THE COURT: Vehicles where?

MR. HARDING: Using the highway.

THE COURT: Using the what?

MR. HARDING: Using the highway.

THE COURT: No, using the roadway, not using the highway.

MR. HARDING: The snowmobiles don't use roadways. You can't read this section if you're going to read it that way. It makes --

THE COURT: Excuse me, how did they get to the location where they stopped just before they stopped there?

MR. HARDING: They crossed roadway on 36.

THE COURT: Right and -- that's right. If they're going to stop along the roadway, they have to be visible back, but they didn't stop along the roadway.

MR. HARDING: So you're saying that if they had stopped on the roadway next to 36, then if they weren't visible for 500 feet, that they were negligent, correct.

THE COURT: I don't know that they'd be negligent as it relates to another snowmobile. They may be negligent as it relates to a car traveling on the roadway. This statute, 346.51, is designed to protect people traveling on the roadway. You're trying to get it to say that they are negligent vis'-a-vis' snowmobilers who are traveling off the roadway some -- I don't know, it's 156 feet wide, how far away was their vehicle parked from the concrete roadway?

MR. HARDING: Fifty-five feet.

THE COURT: So by parking it there, 55 feet away from the roadway, the negligence of this statute

in my view relates to people traveling on the roadway.

MR. HARDING: So --

THE COURT: It doesn't relate to people traveling off the roadway.

MR. HARDING: It specifically refers to people stopping off the roadway. It says don't stop on the roadway but even if you're stopping or standing, a vehicle off the roadway of such highway, you have to have a light that you can see 500 feet.

THE COURT: You also have to consider who the statute's designed to protect when you're determining that it's negligence per se. You know, it is negligence per se to violate a safety statute, right? Let's say it -- you know, we can get --

MR. HARDING: This is negligence per se.

THE COURT: Okay. You're traveling 80 miles an hour, your car is hit by a plane landing on the roadway. Are you negligent per se? No, you're not because it's not designed to protect from planes landing on the roadway. This isn't designed to protect snowmobiles from driving 55 feet off the highway. It's designed to protect vehicles that are traveling on the roadway.

It requires that it be -- that the vehicle when stopped off the roadway is visible 500 feet back

for the protection of people who are using the roadway, not for the protection of the people who are using the land adjacent to the roadway some 55 feet off the roadway. And that's why I don't think it applies.

MR. HARDING: Well, I still ought to be able to use this section to cross examine this witness because what you're saying then is if a snowmobile -- first of all, 350 says it has to be on at night. You've already defined operating as the engine was off, correct?

THE COURT: No. The statute defines it that way.

MR. HARDING: Fine. Then if we turn the engine on and turn the lights off, now he's violated that statute because he hasn't -- he isn't able to be seen for 500 feet.

THE COURT: That's right. If he's sitting on a parked snowmobile with the engine running, pursuant to the state definition of operating and he has his lights out, he's in violation of that statute. I absolutely agree. And you can say well --

MR. HARDING: I ought to be able to cross examine this witness on that then, shouldn't I, if he's saying yes, it's reasonable at 350 feet because he has his engine off, the law requires if it were on, he had

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

KARL A. BURG, et al,

Plaintiffs,

-vs- CASE NO. 98-CV-008875

CINCINNATI CASUALTY INSURANCE, et al

Defendants.

- -

June 1, 2000

Before the HONORABLE MICHAEL MALMSTADT,

Circuit Court Judge, presiding.

JURY TRIAL - PART III of IV

A P P E A R A N C E S :

VICTOR C. HARDING, Attorney at Law, appeared on behalf of the plaintiffs.

GREGORY J. COOK, Attorney at Law, appeared on behalf of the defendants.

Donna J. Richmond, Court Reporter

Q Okay. And, of course, that taillight must be displayed such that it can be scene from 500 feet back, correct?

A Correct.

Q And this was an accident at night, correct?

A Correct.

Q And we know that Mr. Leighton and Mr. Zimmermann did not have their headlights or taillights on, correct?

A Correct.

Q And they were operating their sleds at the time of the accident?

MR. COOK: I'm going to object.

THE COURT: Sustained. We're getting real close.

MR. COOK: Yes.

MR. HARDING: Well, side-bar then, Your Honor?

THE COURT: Okay.

(Discussion had off record.)

THE COURT: Ladies and gentlemen, I want you to go upstairs. Don't talk about the case. We'll get you down here when we're done.

(Jurors excused.)

THE COURT: Let's start from -- right from the beginning. That has become confusing I think.

There has been constant testimony about when you have to have your light on, on a snowmobile. And I think the impression that the jury has right now is wrong. And that is that a snowmobile must be operated with its light and taillight on when it is on a highway or a roadway right-of-way.

That's not the law. The law is that a snowmobile, when operated at night, no matter where you're operating it, a lake, a river, doesn't matter, the nighttime operation with a light has no relationship to whether it's on a highway, roadway. The only time the highway or roadway comes into it is during daylight hours. During daylight hours if you're operating on a roadway or along a roadway, you have to have your light on. At night, no matter where you're operating it, you have to have your light on. I think the statute clearly says that.

Okay. The other thing is, and we have done this a number of times, it's this Court's ruling, and whether it's right or wrong we're stuck with it, a snowmobile that is stopped, parked with the engine off is not as a matter of law being operated. Since it is not being operated as a matter of law, unlike the boating regulations in this state, where if you park a boat with a motor on it in the middle of a lake at

night, you better have a light on because that's the law.

Snowmobiles for some damn reason in this state can be parked without a light, according to the law. Now, that does not mean that parking it without a light on in the middle of a pathway used by other snowmobiles is not negligence. It's just not statutorily prohibited.

And I think we have to -- we have to be real clear on that. We've gotten very close -- you asked him if they were operating those snowmobiles at the time they were sitting there, and the answer to that is no, they weren't. Why is that the answer? I can give you no other answer than I said so. I said so for a long time in this case.

MR. HARDING: See, Your Honor, I understand that. In my humble opinion it's an issue of fact. And this witness is here with special knowledge, special expertise. I didn't know he had all this knowledge and expertise, and I merely wanted to find out what his understanding was. And I'm not trying to tread or -- but I have to find out what the answer is and make a record because if the Court is, in fact, wrong, then it seems to me --

THE COURT: We'll be trying this case over

again.

MR. HARDING: No, we haven't -- nothing -- it has -- there isn't damage yet.

THE COURT: I think there is. If I'm wrong on this issue, it is crucial to your case.

MR. HARDING: Of course.

THE COURT: It is, you know, if the Supreme Court or if the Court of Appeals says I'm wrong and then says it's harmless error, they're goofy. If I'm wrong, this is reversible without a doubt. No question about it. But I don't think I'm wrong, you know. I'm fairly confident I'm right. I don't like the law. I think the law is stupid, but I'm stuck with what the law is.

You know, I think when two people park their snowmobile out there and are sitting around talking about what route they're going to take, it's hard for me to comprehend how the law can say that's not operating, but it does.

MR. HARDING: Well, I understand. I know the Court's ruling. I think this witness can add testimony in that area.

And maybe the Court is right, maybe the Court has made an incorrect ruling up to this point, and maybe the Court can correct its ruling if it feels

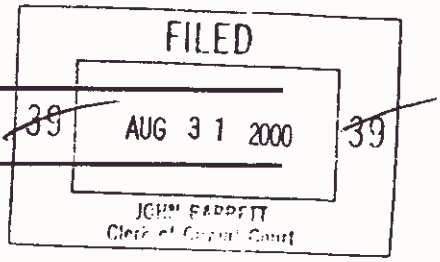
STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY

KARL A. BURG,
Plaintiff,

-vs-

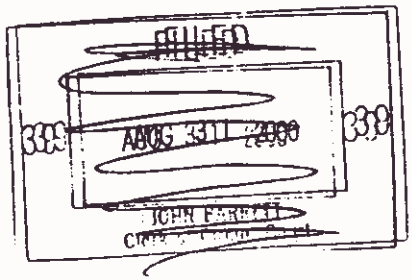
Case No. 98-CV-008875

CINCINNATI CASUALTY INSURANCE CO et al
Defendants.



DECISION

The Plaintiff has moved this Court for a new trial. Because a new trial is only granted in exceptional circumstances and because there is credible evidence to support the jury's verdict, it shall not be disturbed. The plaintiff's motion for a new trial is denied.



BACKGROUND

This case arises out of a motor vehicle accident involving several snowmobiles. On November 29, 1995, about one hour after sunset, Karl A. Burg (Plaintiff) was traveling south parallel to Highway 36, in Racine County. At the time, two new lanes were under construction, but not yet available for automobiles, which made it very popular as a snowmobile path. A few moments before this, Robert W. Zimmerman (Defendant) and Dean Leighton pulled on to the path, stopped their snowmobiles and turned off the ignition so they could talk. When they turned off their engines the headlights were automatically extinguished because the headlights will not operate when

the engine is off. The drivers spent the next few minutes talking while seated on their vehicles. They were about to start their vehicles and leave when Mr. Burg drove his snowmobile along the same path. Burg swerved to avoid Zimmerman's sled and struck Mr. Leighton's sled.

On November 11, 1998 Mr. Burg brought a cause of action for negligence per se pursuant to Wis. Stat. § 350.09(1.) "Any Snowmobile operated during the hours of darkness or operated during daylight hours on any highway right-of-way shall display a lighted headlamp or tail lamp." Because there is no disagreement regarding the facts stated above, the definition of "operate" became the main point of contention. Both before, and during the trial the plaintiff moved the Court to declare the defendant negligent per se. On June 2, 2000 a jury determined that the defendant was not negligent, and that it was the plaintiff's own negligence that had caused his injuries. Plaintiff now brings a motion for a new trial.

DECISION

The plaintiff argues that the defendant was negligent per se. The plaintiff alleges the defendant was "operating" a vehicle in violation of Wis. Stat. § 350.09(1) because his snowmobile was on a highway right of way, after dark, without lights. To support this proposition, defendant cites the definition of "operate" found in Wis. Stats. § 350.01(9r.)

> Operate means the exercise of physical control over the speed or direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion.

There is nothing in this definition that supports the plaintiff's claim. Here the facts show fact that the defendant was merely sitting on a snowmobile that

was not turned on, and that he was not engaged in any physical manipulation or activation of the snowmobile's controls.

Plaintiff cites County of Milwaukee v. Proegler, 95 Wis.2d 614, 626, 291 N.W. 608, 613 (Ct. App. 1980) and State v. Modory, 204 Wis.2d 538, 555 N.W.2d 399 (Ct. App. 1996.) These cases interpret drunk driving law, and stand for the proposition that a driver need not put his vehicle in motion to fall within the definition of "operate." In both cases the defendant was sitting behind the wheel of a vehicle with the engine running. Furthermore, the term "operate" is defined much more broadly in operating while intoxicated cases for reasons of public policy. This is a matter of legislative intent in formulating strict drunk driving laws. Because there was no evidence at trial that any of the parties were intoxicated, the definition of "operate" in Proegler, and Modory, is not applicable in the present case.

The Plaintiff also cites a series of out of jurisdiction cases. These cases interpret a very different statute that dealt with actual "physical control" of a vehicle. The issue in this case revolves around the definition of "operate" and is therefore distinguished from the cases cited by the plaintiff.

The Defendant argues that new trials are granted only under very limited circumstances. "This court is reluctant to grant a new trial in the interest of justice and exercises its discretionary power only in exceptional cases." We do not find this to be an exceptional case. State v. Friedrick, 135 Wis.2d 1, 35,398 N.W.2d 763 (1987 Quoting State v. Cuyler, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983.)) The plaintiff has failed

to present any evidence that there has been a miscarriage of justice. "'There has been no showing of a miscarriage of justice, nor does it appear that a retrial under optimum circumstances will produce a different result." We therefore deny Defendant's request for a new trial." Id.

The jury determined that the defendant, Mr. Zimmerman was not negligent, and that the plaintiff Mr. Burg was negligent and was therefore responsible for his own injuries. A jury's apportionment of negligence and it's award of damages will be sustained if there any credible evidence that supports the verdict. See Gonzalez v. City of Franklin, 137 Wis.2d 109, 134, 403 N.W.2d 747 (1987.) Given the facts in this case, there is sufficient evidence to support a view that at the time of the accident the defendant was not operating his vehicle negligently or otherwise. Therefore the jury's verdict will not be disturbed, and plaintiff's motion for a new trial is denied.

Dated at Milwaukee, Wisconsin, this 31 day of August 2000.

BY THE COURT:

Honorable Michael Malmstadt
Circuit Court Judge
Branch 39

47 Ohio St.2d 94

CITY OF CINCINNATI, Appellant,

v.

KELLEY, Appellee.

No. 75-919.

Supreme Court of Ohio.

July 14, 1976.

Defendant was convicted of being in actual physical control of a vehicle while under the influence of alcohol, in violation of Cincinnati municipal code, and he appealed. The Court of Appeals for Hamilton County reversed and motion to certify the record was allowed. The Supreme Court, Herbert, J., held that municipal code section prohibiting one from operating or being in actual physical control of a vehicle while under the influence of alcohol or drugs does not conflict with statute which excludes physical control as a possible statutory offense; and that defendant who was seated in driver's seat of parked automobile with his hands on the steering wheel and keys in the ignition with the engine not running and who had called his wife to come and get him after he realized he was in no condition to drive was in actual physical control of the vehicle at the time of his arrest.

Reversed.

Celebrezze, J., concurred in the judgment only.

J. J. P. Corrigan and William B. Brown, JJ., dissented.

1. Automobiles ⇐318

Section of Cincinnati municipal code providing that no person under the influence of alcohol or a drug of abuse shall operate or be in actual physical control of any vehicle within the city does not conflict with statute which excludes physical control as a possible statutory offense. R.C. § 4511.19.

2. Automobiles ⇐332

Purpose of the control aspect of Cincinnati municipal code provision prohibiting person under influence of alcohol from operating or being in actual physical control of the vehicle, of deterring persons from being found under circumstances in which they can directly commence operating a vehicle while they are under the influence of alcohol or particular drugs, is reasonably related to the health, safety and welfare of the general public.

3. Automobiles ⇐332

The term "actual physical control," as employed in Cincinnati municipal code provision prohibiting one from operating or being in actual physical control of a vehicle while under the influence of alcohol or drugs of abuse requires that the person be in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that he is physically capable of starting the engine and causing the vehicle to move.

See publication Words and Phrases for other judicial constructions and definitions.

4. Automobiles ⇐332

Defendant who was seated in driver's seat of parked automobile with his hands on the steering wheel and the keys in the ignition, with the engine not running and the interlock seat belt unfastened, and who, realizing he was in no condition to drive, had called his wife to come and get him was in actual physical control of the vehicle at time of his arrest for purpose of Cincinnati municipal code provision prohibiting one from operating or being in actual physical control of vehicle while under influence of alcohol.

Syllabus by the Court

To be in actual physical control of an automobile, under the provisions of Section 506-1 of the Cincinnati Municipal Code, a person must be in the driver's seat of the

vehicle, behind the steering wheel, in possession of the ignition key, and be in such condition that he is physically capable of starting the engine and causing the vehicle to move.

On the afternoon of June 15, 1974, patrolman Eugene Depue received a radio message that there was an intoxicated person in an automobile on Walnut Street in the city of Cincinnati, appellant herein. After locating the vehicle and asking the occupant, appellee Edward Kelley, to step out, Officer Depue observed that Mr. Kelley was in an intoxicated condition. Kelley was then arrested and charged with being in actual physical control of a vehicle while under the influence of alcohol, in violation of Section 506-1 of the Cincinnati Municipal Code.

Appellee entered a plea of not guilty and waived his right to a jury trial. At the trial, Officer Depue testified that when he arrived on the scene, the automobile was legally parked; that appellee was seated in the driver's seat with his hands on the steering wheel and the keys in the ignition; and that the engine was not running.

According to appellee, he had driven downtown early in the morning, while completely sober, and lawfully parked on Walnut Street. After drinking at a bar, he realized he was in no condition to drive and, sometime between 12:00 P.M. and 1:00 P.M., went back to his car and lay down on the front seat. He stated he did not leave the car until about 3:00 P.M., at which time he called his wife and requested her to come and get him. Kelley testified further that when he returned to the car he again lay down upon the front seat and that he was arrested shortly thereafter. Additionally, it was uncontroverted that the driver's seat belt, which had to have been in use in order for the engine to be started, was not fastened.

At trial, appellee was found guilty as charged. The Court of Appeals reversed the conviction, finding that the "actual physical control" aspect of the ordinance must relate to operation of a vehicle and, in the case before it, the factor of operation was absent.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Paul J. Gorman, Pros. Atty., and J. Anthony Sawyer, Cincinnati, for appellant.

John Andrew West and Timothy R. Cutcher, Cincinnati, for appellee.

HERBERT, Justice.

The rulings of the courts below resolved, for our purposes here, all questions concerning credibility of witnesses and weight of evidence.

This appeal concerns the validity and construction of part of Section 506-1 of the Cincinnati Municipal Code, which states:

"No person who is under the influence of alcohol or a drug of abuse as defined in Section 3719.011 Ohio Revised Code shall operate *or be in actual physical control of any vehicle within this city.*" (Emphasis added.)

Appellant and appellee submit that the ordinance provides for two separate offenses, in that it prohibits one from operating *or* being in "actual physical control" of a vehicle while under the influence of alcohol or drugs of abuse. Decisions of courts of this state and other jurisdictions construing similar statutes support that interpretation. See *e. g., State v. Wilgus* (1945), 31 Ohio Ops. 443; *State v. Esoto* (1961), 116 Ohio App. 1, 186 N.E.2d 206; *State v. Purcell* (Del.Super.1975), 336 A. 2d 223; *Newman v. Stinson* (Ky.1972), 489 S.W.2d 826; *State v. Webb* (1954), 78 Ariz. 8, 274 P.2d 338; and *Parker v. State* (Okl.Cr.App.1967), 424 P.2d 997.

Appellee contends that insofar as the ordinance, a local police regulation, pro-

scribes being in actual physical control of a vehicle while under the influence of alcohol or certain drugs, it conflicts with R.C. 4511.19 and is unconstitutional.[1]

R.C. 4511.19 states:

"No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse, shall operate any vehicle, streetcar, or trackless trolley within this state."

This question was also raised in *Sidney v. Thompson* (1962), 118 Ohio App. 512, 196 N.E.2d 112, in which the defendant attacked the constitutionality of a city ordinance containing language almost identical to the ordinance now before us. In rejecting the assertion that a conflict existed, the court stated in paragraph one of its syllabus:

"A municipal ordinance making it an offense to 'operate or be in actual physical control' of a vehicle while under the influence of intoxicating liquor, narcotic drugs or opiates, is not in conflict with Section 4511.19, Revised Code, which excludes physical control as a possible statutory offense."

See, also, *Toledo v. Best* (1961), 172 Ohio St. 371, 176 N.E.2d 520, where this court recognized the retention in the city ordinance of physical control as a possible statutory offense and its deletion from R.C. 4511.19,[2] yet upheld the constitutionality of the ordinance.

[1] In view of the above, and the criterion upon which such questions of conflict are determined,[3] no conflict exists between the instant ordinance and R.C. 4511.19.

Appellant contends that under the circumstances of this case, appellee was in "actual physical control" of his vehicle, within the meaning of the ordinance.

[2] This court has often stated that a municipality may enact ordinances to promote the health, safety and general welfare of the public if the means adopted bear a real and substantial relationship to their purpose. *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 124 N.E. 212; *Dragelevich v. Youngstown* (1964), 176 Ohio St. 23, 197 N.E.2d 334. The clear purpose of the control aspect of the instant ordinance is to deter persons from being found under circumstances in which they can directly commence operating a vehicle while they are under the influence of alcohol or particular drugs. Cf. *Mentor v. Giordano* (1967), 9 Ohio St.2d 140, 224 N.E.2d 343. This is an objective which is reasonably related to the health, safety and welfare of the general public. However, to satisfy the requirement of *Froelich* and *Dragelevich*, *supra*, the term "actual physical control" must relate, in a reasonable manner, to the evil the ordinance is intended to combat, viz., the prevention of the operation of vehicles by persons whose faculties are appreciably impaired from the consumption of alcohol or use of drugs of abuse.

[3] Therefore, the term "actual physical control," as employed in the subject ordinance, requires that a person be in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that he is physi-

1. Section 3 of Article XVIII of the Constitution of Ohio provides:
"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

2. As noted in *Best*, both G.C. 6307-19(a) and R.C. 4511.19 which superseded it, contained physical control as a statutory offense. In October 1953 (125 Ohio Laws 461), R.C. 4511.19 was amended to delete physical control as an offense.

3. See *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519; *Cleveland v. Raffe* (1968), 13 Ohio St.2d 112, 235 N.E.2d 138; *Cincinnati v. Hoffman* (1972), 31 Ohio St. 2d 163, 285 N.E.2d 714.

cally capable of starting the engine and causing the vehicle to move.[4]

[4] Under this test, the instant record supports a conclusion that appellee was under the influence of alcohol and was in actual physical control of the vehicle at the time of his arrest.

The judgment of the Court of Appeals is reversed.

Judgment reversed.

C. WILLIAM O'NEILL, C. J., and STERN and PAUL W. BROWN, JJ., concur.

CELEBREZZE, J., concurs in the judgment only.

J. J. P. CORRIGAN and WILLIAM B. BROWN, JJ., dissent.

47 Ohio St.2d 103

The STATE of Ohio, Appellant,

v.

ROBINSON, Appellee.

No. 75-943.

Supreme Court of Ohio.

July 21, 1976.

Defendant was convicted in the Court of Common Pleas, Franklin County, of voluntary manslaughter, and he appealed. The Court of Appeals for Franklin County reversed, and motion for leave to appeal was allowed. The Supreme Court, Stern, J., held, inter alia, that under statute, in a criminal case involving affirmative defense of self-defense, defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise that defense, and does not have the burden of establishing such defense by a preponderance of the evidence.

Judgment of Court of Appeals affirmed and cause remanded to trial court.

Celebrezze, J., concurred in the judgment.

J. J. P. Corrigan, J., filed a dissenting opinion.

1. Criminal Law ⇐326

"Burden of proof" refers both to the burden of going forward with or of producing evidence and to burden of persuasion; party having burden of producing evidence on an issue loses on that issue as a matter of law if evidence sufficient to make out a case for the trier of fact is not produced while party having burden of persuasion loses if he fails to persuade the trier of fact that an alleged fact is true by such quantum of evidence as the law demands.

See publication Words and Phrases for other judicial constructions and definitions.

2. Evidence ⇐91, 96(1)

In a civil case, plaintiff normally has the burden of producing evidence to support his case and defendant has the burden of producing evidence of any affirmative defenses.

3. Evidence ⇐596(1)

In a civil case, the burden is to persuade the trier of fact by a preponderance of the evidence or, on some issues, by clear and convincing evidence, and if trier of fact finds itself in doubt, it must decide issue against the party having such burden.

4. Under the test for "actual physical control," as enunciated herein, the fact that appellee's interlock seat belt was not fastened bears solely upon his capability to start the engine.

*250 N.W.2d 252, *; 1977 N.D. LEXIS 223, ***

State of North Dakota, Plaintiff and Appellee v. Gerald A. Ghylin, Defendant and Appellant

Criminal No. 568

Supreme Court of North Dakota

250 N.W.2d 252; 1977 N.D. LEXIS 223

January 27, 1977

PRIOR HISTORY: [1]**

Appeal from the County Court With Increased Jurisdiction of Burleigh County, the Honorable Gerald G. Glaser, Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: highway, actual physical control, roadway, driving, ignition, driver, deputy sheriff, vehicular, evening, travel, ditch, steering wheel, intoxicated, hitchhiker, arrested, improved, influence of intoxicating liquor, shoulder, arrived, width, drive, transmission, encouraged, drinking, deter, circumstantial evidence, statutory definition, intoxicating liquor, intoxicated person, actually driving

COUNSEL: Daniel J. Chapman, Bismarck, for Defendant and Appellant.

John M. Olson, State's Attorney, and Rolf Sletten, Assistant State's Attorney, Bismarck, for Plaintiff and Appellee; argued by Rolf Sletten.

JUDGES: Paulson, Sand, Vogel, Erickstad, C.J. Opinion of the Court by Pederson, Justice.

OPINIONBY: PEDERSON

OPINION: [*253] This is an appeal by the defendant, Gerald A. Ghylin, from his conviction by the Burleigh County Court With Increased Jurisdiction of the crime of being in "actual physical control" of a vehicle upon a highway while under the influence of intoxicating liquor, in violation of § 39-08-01, NDCC. In this proceeding, Ghylin contends that (1) he was not in "actual physical control" of the vehicle, and (2) he was not "upon a highway" at the time of his arrest. We affirm.

Ghylin was arrested by Burleigh County Deputy Sheriff Paul Genter about midnight on April 17, 1976, after Genter had stopped his patrol car two or three miles west of Wing, North Dakota, to investigate a vehicle in the ditch, apparently signalling for help with its **[**2]** headlights. Genter testified that as he approached Ghylin was just getting out of the driver's side of the vehicle and, in doing so, he made a motion as if he were taking the keys out of the ignition. The deputy sheriff observed that Ghylin had the keys in his hand as he alighted from the vehicle.

According to Genter's testimony, Ghylin told him that he had driven into the ditch and gotten stuck. After detecting the odor of alcohol, Genter asked Ghylin to perform some balancing and coordination tests, such as finger-to-nose and walking a straight line. Ghylin's poor performance of these tests indicated to Officer Genter that Ghylin was intoxicated; he placed

him under arrest, informed him of his *Miranda* rights, and transported him to the Burleigh County sheriff's office.

Deputy Sheriff Genter also testified that during the ride to Bismarck, Ghylin again indicated that he had been driving the vehicle. At the Burleigh County sheriff's office, Ghylin was given a Breathalyzer test, which subsequently indicated a blood alcohol content of.14%.

Ghylin's version of the incidents of the evening differs markedly from Deputy Sheriff Genter's testimony, and is substantially as follows: **[**3]**

Ghylin left Wing in the company of a hitchhiker he had picked up earlier in the evening. The hitchhiker was actually driving the vehicle with Ghylin's permission when it left the road and went into the ditch a few miles west of Wing. When the deputy sheriff arrived on the scene, the hitchhiker, afraid of being arrested, hid on the floorboard of the vehicle and remained undetected. Ghylin did not tell Officer Genter that he had been driving that evening, as Genter, on two occasions, testified that he had, nor did he disclose to anyone that someone else was driving, apparently in an effort to protect the hitchhiker.

Ghylin also disputes the deputy sheriff's testimony that he removed the key from the ignition, or that he was given any balancing or coordination tests prior to his **[*254]** arrival at the Burleigh County sheriff's office.

In support of Ghylin's testimony, defense witness Albert Rosenau testified that at about midnight on the evening in question he observed the Ghylin vehicle and recognized Ghylin as a passenger in that vehicle, although he was unable to identify the driver. One additional conflict in the evidence involves a rear tire of Ghylin's vehicle which, from **[**4]** an examination of a picture introduced as an exhibit by Ghylin at trial, appears to be completely off the rim of the vehicle. Deputy Sheriff Genter testified that all of the tires were on the vehicle when he arrested Ghylin that evening.

The statute under which Ghylin was convicted, § 39-08-01, NDCC, states in part:

> "1. No person shall drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if:
>
> "a. * * *
>
> "b. He is under the influence of intoxicating liquor;"

Ghylin first contends that the evidence was insufficient to support the conclusion that he was in actual physical control of his vehicle. We believe that, in view of the foregoing conflicting evidence concerning the events of the evening, sufficient evidence existed to support Ghylin's conviction of being in actual physical control of a vehicle while intoxicated. As we said in *State v. Allen*, 237 N.W.2d 154, 161 (N.D. 1975):

> "We have noted the different perspectives of the trial court and the appellate court as to circumstantial evidence:
>
> 'In *State v. Miller*, 202 **[**5]** N.W.2d 673 (N.D. 1972); *State v. Champagne*, 198 N.W.2d 218 (N.D. 1972), and *State v. Carroll*, 123 N.W.2d 659 (N.D. 1963), we pointed out that the rule as to circumstantial evidence, at the trial level, is that such evidence must be conclusive and must exclude every reasonable hypothesis of

> innocence, but at the appellate level we do not substitute our judgment for that of the jury or trial court where the evidence is conflicting, if one of the conflicting inferences reasonably tends to prove guilt and fairly warrants a conviction.' *State v. Kaloustian*, 212 N.W.2d 843, 845 (N.D. 1973); *accord, State v. Fuchs*, 219 N.W.2d 842, 846 (N.D. 1974); *State v. Neset*, 216 N.W.2d 285, 287 (N.D. 1974); and *State v. Steele*, 211 N.W.2d 855, 870 (N.D. 1973)."

The admission of the defendant on two separate occasions that he was driving, along with the other evidence, is sufficient to support the trial court's conclusion that he was in actual physical control of the vehicle. Ghylin attempts to distinguish the instant case from the situation in *State v. Schuler*, 243 N.W.2d 367 (N.D. 1976), in which we affirmed a conviction of being in actual physical control of a vehicle **[**6]** when the defendant was shown to have been behind the steering wheel of the vehicle, the ignition was turned to the "on" position, and the transmission was engaged. He contends that in the instant case the ignition was off and the transmission was not engaged.

The definition of "actual physical control" does not rest on such fine distinctions. The court, in *Commonwealth v. Kloch*, 230 Pa.Super. 563, 327 A.2d 375, 383 (1975), defined the phrase in these terms:

> "A driver has 'actual physical control' of his car when he has real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, its movements of machinery. * * *
>
> "It is not dispositive that appellant's car was not moving, and that appellant was not making an effort to move it, when the troopers arrived. A driver may be in 'actual physical control' of his car and therefore 'operating' it while it is parked or merely standing still 'so long as [the driver is] keeping the car in restraint or in position to regulate its movements. Preventing a car from moving is as much control and dominion as actually putting the car in motion on the highway. Could one exercise any more regulation **[**7]** over a **[*255]** thing, while bodily present, than prevention of movement or curbing movement.' *State v. Ruona, supra* 133 Mont. 243, 248, 321 P.2d 615, 618." [Punctuation as in original.]

In *State v. Schuler, supra*, we noted that the Oklahoma court in *Hughes v. State*, Okl. Cr., 535 P.2d 1023, 1024 (1975), sustained a conviction for being in actual physical control where the defendant was found slumped behind the steering wheel, with the key in the ignition. In that case, the Oklahoma court said:

> "We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had 'actual physical control' of the vehicle within the meaning of the statute."

Ghylin argues that to sustain convictions of being in **[**8]** actual physical control of a vehicle while intoxicated in cases where the defendant has voluntarily stopped his vehicle off the road after realizing his inability to drive safely is to discourage such behavior in the future. He argues that convictions under these circumstances will encourage drivers aware of their impaired driving capability to continue driving rather than risk conviction for being in actual physical control should they pull off the highway to await other transportation.

While we believe such behavior should be encouraged, the real purpose of the statute is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers. As stated in *State v. Schuler, supra,* the "actual physical control" offense is a preventive measure intended to deter the drunken driver. One who has been drinking intoxicating liquor should not be encouraged to test his driving ability on the highway, even for a short distance, where his life and the lives of others hang in the balance.

In *City of Cincinnati v. Kelley,* 47 Ohio St.2d 94, 351 N.E.2d 85 (1976), the Ohio court sustained a conviction of being in actual physical control where **[**9]** the defendant was found in his vehicle at the side of the road. After realizing he was in no condition to drive, the defendant had left the vehicle to telephone his wife to pick him up. When the police arrived, they found him back in his car, with the key in the ignition, supposedly awaiting his wife's arrival. Finding the defendant to have been in actual physical control, the court said:

> "Therefore, the term 'actual physical control,' as employed in the subject ordinance, requires that a person be in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that he is physically capable of starting the engine and causing the vehicle to move." 351 N.E.2d at 87, 88.

Even if we could envision a set of circumstances in which a defendant, by his conduct, finding himself upon a highway in an impaired condition, acted reasonably to safeguard his life and the lives of others, this is certainly not such a case. At trial, Ghylin testified that he was attempting to get his vehicle out of the ditch, and that the vehicle almost broke free when Deputy Sheriff Genter arrived. Such conduct does not represent a realization of impaired **[**10]** driving ability, a sincere effort to remain off the highway, or a concern for the safety of others.

Ghylin next contends that he was not "upon a highway" when apprehended, as required by the statute. Section 39-01-01, NDCC, contains the statutory definition of these relevant terms:

> "21. 'Highway' shall mean the entire width between the boundary lines of every way publicly maintained when any part thereof is open to **[*256]** the use of the public for purposes of vehicular travel;
>
> * * * *
>
> "50. 'Right of way' shall mean the privilege of the immediate use of a roadway;
>
> * * * *
>
> "52. 'Roadway' shall mean that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways the term 'roadway' as used herein shall refer to any such roadway separately but not to all such roadways collectively;"

Ghylin's argument that the ditch along the roadway is not part of the "highway" rests upon this tenuous logic: "Highway" in subsection 21 above is defined as the entire width of every way publicly maintained. "Way" refers to "right of way," defined in subsection **[**11]** 50 above as use of a "roadway," which is further defined in subsection 52 above as "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder."

Thusly, Ghylin arrives at his definition of "highway." Such a narrow definition of "highway" has been foreclosed, however, by our decision in *State v. Fuchs*, 219 N.W.2d 842 (N.D. 1974), where in sustaining a conviction of driving while intoxicated, we held that the shoulder is considered to be part of the highway.

Moreover, the subsections set out above clearly encompass a broader definition of "highway" than Ghylin suggests. A rule of statutory construction is that words will be given their plain, ordinary, and commonly understood meaning. *Tormaschy v. Hjelle*, 210 N.W.2d 100 (N.D. 1973). Subsection 21 of Section 39-01-01 defines "highway" as "the entire width * * * when any part thereof is open to the use of the public for purposes of vehicular travel." The clear inference is that "highway" means more than the paved or improved portion used for travel. This analysis is supported by the definition of "Roadway" in subsection 52. That term, which Ghylin proposes as a synonym **[**12]** for "highway," is defined, in part, as "that portion of a highway," thus clearly indicating that "highway" includes an area larger than that portion improved and used exclusively for vehicular travel. In this instance, we believe the statutory definition of "highway" includes the ditch alongside the roadway.

We believe the evidence was sufficient to sustain the conviction of being in actual physical control of a vehicle upon a highway while under the influence of intoxicating liquor.

The judgment is affirmed.

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Date/Time: Wednesday, January 9, 2002 - 12:06 PM EST

Charles HUGHES, Appellant,
v.
The STATE of Oklahoma, Appellee.
No. M-75-174.

Court of Criminal Appeals of Oklahoma.
May 13, 1975.
Rehearing Denied June 5, 1975.

Defendant was convicted in the District Court, Cherokee County, Lynn Burris, J., of actual physical control of motor vehicle while under influence of intoxicating liquor, and he appealed. The Court of Criminal Appeals, Bussey, J., held that where defendant, when arrested, was behind the wheel and could have at any time started it and driven away, he had "actual physical control" of automobile within statute proscribing actual physical control of motor vehicle while under influence of intoxicating liquor and that evidence sustained conviction.

Affirmed.

1. Automobiles ⇐332

Legislature, in making it a crime to be in "actual physical control of a motor vehicle while under the influence of intoxicating liquor," intended to enable police to apprehend the drunken driver before he strikes. 47 Okl.St.Ann. § 11-902.

2. Automobiles ⇐332

Where defendant, when arrested, was behind the wheel of car and could have at any time started it and driven away, he had "actual physical control" of automobile within statute proscribing actual physical control of motor vehicle while under influence of intoxicating liquor. 47 Okl.St.Ann. § 11-902.

See publication Words and Phrases for other judicial constructions and definitions.

3. Automobiles ⇐355(6)

Evidence sustained conviction of actual physical control of motor vehicle while under influence of intoxicating liquor. 47 Okl.St.Ann. § 11-902.

An appeal from the District Court, Cherokee County; Lynn Burris, Judge.

Charles Hughes, appellant, was convicted of the offense of Actual Physical Control of a Motor Vehicle While Under the Influence of Intoxicating Liquor; was sentenced to thirty (30) days in the County Jail and fined in the amount of One Hundred ($100.00) dollars, and appeals. Judgment and sentence affirmed.

John T. Lawson, Tahlequah, for appellant.

Larry Derryberry, Atty. Gen., Michael Jackson, Asst. Atty. Gen., for appellee.

OPINION

BUSSEY, Judge:

Appellant, Charles Hughes, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Cherokee County, Case No. CRM-73-389, for the crime of Actual Physical Control of a Motor Vehicle While Under the Influence of Intoxicating Liquor (47 O.S. § 11-902). His punishment was fixed at a term of thirty (30) days in the County jail and a fine of One Hundred ($100.00) dollars. From said judgment and sentence, a timely appeal has been perfected to this Court.

Briefly stated, the facts are that on September 3, 1973, at approximately 9:00 p. m., Don Fields, a trooper for the Oklahoma Highway Patrol, was called to investigate an improperly parked vehicle in the Sharon Hills Addition of Cherokee County. Upon arriving at the scene, he observed a 1972 Buick, white over gold, sitting at a 90 degree angle on the roadway. He observed two people in the automobile. The defendant was situated in the front seat with his feet on the front floorboard underneath the steering wheel and his head was down leaning towards the passenger side of the automobile. Trooper Fields

gained entry to the vehicle by arousing the defendant's son who was asleep in the back seat. The ignition key was in the ignition. After arousing the defendant, Trooper Fields observed that the defendant was unstable on his feet, his speech was slurred, his eyes were bloodshot, and he smelled "very strong of alcoholic beverage." In Trooper Fields' opinion the defendant was very intoxicated.

The defendant did not take the stand nor offer any evidence in his behalf.

Defendant's sole assignment of error asserts that the evidence presented in this case was wholly insufficient to support a conviction of the crime of Actual Physical Control of a Motor Vehicle While Under the Influence of Intoxicating Liquor.

In the case of Parker v. State, Okl.Cr., 424 P.2d 997 (1967), this Court held in Syllabi two and three:

"2. Actual physical control, as used in Title 47 O.S.A. § 11–902(a), means: existing or present bodily restraint, directing influence, domination or regulation of any automobile, while under the influence of intoxicating liquor.

"3. If a person has existing or present bodily restraining, directing influence, domination or regulation of an automobile, while under the influence of intoxicating liquor, he commits an offense within the provisions of the statute."

In the case of State v. Wilgus, Ohio Com.Pl., 17 Ohio Supp. 34 (1954), in which the Ohio Supreme Court was construing a statute similar to the instant statute, that court held that the statute defined two distinct offenses, "operating a vehicle," and "being in actual physical control of a vehicle" while intoxicated. The court further held that the control contemplated meant more than the "ability to stop an automobile," but meant the "ability to keep from starting," "to hold in subjection," "to exercise directing influence over," and "the authority to manage."

[1] It is our opinion that the legislature, in making it a crime to be in "actual physical control of a motor vehicle while under the influence of intoxicating liquor," intended to enable the drunken driver to be apprehended before he strikes. As was stated in the case of State v. Harold, 74 Ariz. 210, 246 P.2d 178 (1952):

". . . It appears to us to be even more important for the legislature to prevent operators of cars who are under the influence of intoxicating liquors or who are at the time driving recklessly and in wilful and wanton disregard for the safety of persons or property, from entering upon the highways and into the stream of traffic than to permit them to enter thereon and after a tragic accident has happened to punish them for maiming or causing the death of those who are lawfully in the use of such highways. . . ."

[2, 3] We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had "actual physical control" of the vehicle within the meaning of the statute. We, therefore, find there was sufficient competent evidence to support the verdict.

Finding no error sufficient to warrant modification or reversal, it is our opinion that the judgment and sentence appealed from should be, and the same is hereby, affirmed.

BRETT, P. J. and BLISS, J., concur.

SUPREME COURT OF WISCONSIN

KARL A. BURG, by his
legal guardian,
GLADYS M. WEICHERT,

Plaintiff-Appellant,

Case No.: 00-3258

-v-

CINCINNATI CASUALTY/ INSURANCE
COMPANY and ROBERT W. ZIMMERMAN,

Defendants-Respondents-Petitioners.

Appeal From a Judgment Entered 11/9/00 by the Milwaukee
County Circuit Court-
The Honorable Michael Malmstadt
Case No: 98-CV-008875

REPLY BRIEF OF DEFENDANTS-RESPONDENTS-PETITIONERS, CINCINNATI INSURANCE COMPANY AND ROBERT W. ZIMMERMAN

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ARGUMENT

I. ZIMMERMAN WAS NOT OPERATING HIS SNOWMOBILE AT THE TIME OF THIS ACCIDENT AND WAS THEREFORE, NOT NEGLIGENT PER SE.

The question to be decided on appeal is, "Was Robert Zimmerman operating his snowmobile at the time of this accident, as that term is defined in §350.01(9r), Stats?" To answer this question, this Court applies the clear and unambiguous statutory definition to an undisputed set of facts.

This Court has previously ruled that consideration of matters beyond the statutory definition is impermissible where the statute is unambiguous, "On any question of statutory construction, the initial inquiry is to the meaning of the statute. If the statute is unambiguous, resort to judicial rules of interpretation and construction is not permitted, and the words of the statute must be given their intended and obvious meaning." *Schmidt v. Employe Trust Funds Board*, 153 Wis.2d 35, 41, 449 N.W.2d 268 (1990).

Karl Burg would have this Court take a detour in making that determination. It is hard to fathom how "drunk driving" laws, examples of drunken police chases, cases interpreting insurance contracts and Amish buggy drivers

are instructive in applying this clear statute to undisputed facts. In this case, the question can be squarely addressed by the application of the definition of "operate" found in §350.01(9r), Stats., to undisputed facts.

In order to "operate" a snowmobile, one must either exercise physical control over the speed or direction of that snowmobile or activate or manipulate the controls necessary to put that snowmobile in motion. Wis. Stat. §350.01(9r) (1999). At the time of this accident, Robert Zimmerman's snowmobile was incapable of speed or direction. The snowmobile motor was turned off. The snowmobile was stopped. In order for that snowmobile to move, it was necessary that Zimmerman first turn his key to the "on" position. Zimmerman then had to pull a starter rope until the motor fired. Then, and only then, was Zimmerman's snowmobile capable of speed and direction. Because Zimmerman's snowmobile was not capable of speed or direction, it was impossible for him to exercise control over the snowmobile's speed or direction. Zimmerman was not "operating" his snowmobile at the time of this accident.

Likewise, Zimmerman was not activating or manipulating the controls necessary to put the snowmobile in motion.

Zimmerman was simply sitting on his non-running, stationary snowmobile conversing with his friend.

To hold that these actions constitute "operation" under the terms of the statute, expands this statute beyond its express terms and is improper. Therefore, Robert Zimmerman was not operating his snowmobile and was not negligent per se.

It must be noted that Burg misstates the courts' holding in *Proegler* and *Modory*. At issue in these cases was the determination whether the respective defendants were "operating, "defined as "physically manipulating or activating the controls necessary to put the motor vehicle in motion." *See Milwaukee County v. Proegler*, 95 Wis.2d 614, 625, 291 N.W.2d 608 (Ct. App. 1980) ("The court is of the opinion that the defendant's conduct falls within the definition of "operate" . . . .) and *State v. Modory*, 204 Wis.2d 538, 555 N.W.2d 399, 410-02 (Ct. App. 1996) ("We note that Modory was charged with operating, not driving, a motor vehicle . . . operation of a motor vehicle merely requires the manipulation or activation of the controls of the vehicle"). In both cases, the fact that the defendants' vehicles had running motors served as evidence that they activated or manipulated the controls necessary to put the vehicle in motion. Burg, in his Brief, states,

"It would make no substantial difference to the *Proegler* decision whether the engine was running or not, especially since Proegler was asleep." (Burg Brief, p. 17) This statement is incorrect. In the absence of a running motor, there is no evidence of Proegler's activation or manipulation of his vehicle's controls.

Burg's citation to unpublished opinions in his Brief is wholly inappropriate pursuant to §809.23(3), Stats. *See* Wis. Stat. §809.23(3)(1999). Burg claims that these cases have no precedential value and are only offered to advise the court of their existence. It is unclear as to why Burg cites to these cases if not for their precedential value. Because these cases are unpublished, they warrant no consideration by this Court.

This Court's proper focus is on the statutory definition found in §350.01(9r), Stats. This definition does not entail the simple act of sitting on a stopped, non-running snowmobile, conversing with a friend. Because these actions do not fall within the statute, Robert Zimmerman was not "operating" his snowmobile at the time of this accident and was not negligent per se.

II. SEC. 346.51, STATS. IS INAPPLICABLE TO THE FACTS IN THIS CASE

Sec. 346.51, Stats., mandates that no person shall park, stop or leave a vehicle standing off of a roadway unless that vehicle can be seen from distance of 500 feet in either direction. Wis. Stat. §346.51 (1999). Sec. 346.51, Stats., is made applicable to snowmobiles by virtue of §346.02 (10), Stats., which provides, "The operator of a snowmobile **upon a roadway** shall in addition to the provisions of ch. 350 be subject to . . . 346.51 . . . ." Wis. Stat. §346.02 (10) (1999) (Emphasis Supplied).

"Roadway" is defined as the "portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm or shoulder." Wis. Stat. §340.01 (54) (1999). At the time of this accident, it is undisputed that Robert Zimmerman was not upon the roadway of STH 36. (R. 63 at 272) In fact, Zimmerman's snowmobile was parked over 55 feet away from the concrete portion of STH 36. (Id.) The accident occurred on the unfinished, gravel portion of what would later become the roadway of STH 36.

Sec. 346.02, Stats., explicitly applies only to snowmobiles upon a roadway. In this case, Zimmerman's

snowmobile was not upon the roadway, therefore, §346.51, Stats., is inapplicable. Zimmerman was not in violation of this statute and therefore, was not negligent per se.

CONCLUSION

For the reasons listed above and presented in Robert Zimmerman and Cincinnati's original Brief, these petitioners respectfully request that this Court enter an Order finding that Robert Zimmerman was not negligent per, thereby overruling the court of appeals.

Dated this 25th day of January, 2002.

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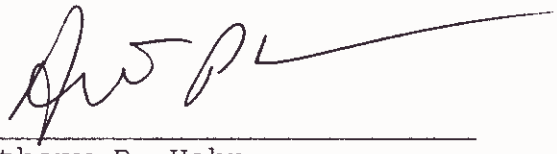
FORM AND LEGTH CERTIFICATION

I certify that this Brief conforms to the rules contained in §§809.19(8)(b) and 809.62(4), Stats., for a brief produced using the following font:

Monospaced Font: 10 characters per inch; double-spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this brief is 9 pages.

Dated this 25th day of January, 2002.



Anthony P. Hahn
State Bar No.: 1032819

SUPREME COURT OF WISCONSIN

KARL A. BURG, by his legal gurdian,
GLADYS M. WEICHERT,

Plaintiff-Appellant,

v. Case No. 00-3258

CINCINNATI CASUALTY INSURANCE CO.,
and ROBERT W. ZIMMERMAN,

Defendants-Respondents-Petitioners.

AMICUS CURIAE BRIEF AND APPENDIX

Appeal from a Judgment entered November 9, 2000, by the Circuit Court for Milwaukee County, the Honorable Michael Malmstadt presiding, Case No.: 98-CV-008875.

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INTRODUCTION AND STATEMENT OF AMICUS CURIAE INTEREST

In this case, the plaintiff-appellant, Karl Burg, suffered severe and permanent injuries as a result of striking one of two snowmobiles stopped at night on a snowmobile track. The issue before this Court is whether the defendant-petitioner was "operating" his snowmobile at night without lights, in violation of the Wisconsin statutes. In the trial court's view, the defendant was not "operating" his snowmobile as the legislature has defined that term in Wisconsin Statute § 350.01(9r). Reversing the trial court, the court of appeals held in a majority, published opinion that by sitting on a snowmobile with the key in the ignition, the defendant was operating his snowmobile, even though the engine was not running.

Mothers Against Drunk Driving (MADD) respectfully submits this brief amicus curiae in support of the plaintiff-appellant, Karl Burg, and urges this Court to affirm the court of appeals decision in *Burg v. Cincinnati Casualty Insurance Co.*, 2001 WI App. 241, 635 N.W.2d 622 (WI Ct. App. 2001).

For almost two decades, Mothers Against Drunk Driving (MADD) has been an active participant in national, state and local, legislative and judicial forums, examining the problems related to

drunk driving and promoting the rights of drunk driving victims. MADD has a significant interest in the decision that this Court will make with regard to the scope of the word "operate". One of MADD's primary goals is to ensure that individuals who are charged with operating under the influence of alcohol are prosecuted to the fullest extent of the law. In 2000, 345 people were killed in Wisconsin in alcohol-related traffic accidents; that is 43.2% of all traffic fatalities in Wisconsin for 2000.[1] Although not specifically related to drunk driving, this Court's interpretation of "operate" will have a significant impact on the future ability of law enforcement to successfully prosecute individuals who cause death or serious bodily injury to others while operating a motor vehicle while under the influence of alcohol. To rule that the defendant-petitioner was not operating his vehicle when he was sitting behind the wheel, engine off, with the keys in the ignition, could have the effect of creating a hole in the drunk driving laws for those intoxicated individuals conscious enough to pull over and turn off their cars. This result would surely be in contravention of the Wisconsin legislature's

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[1] Fatality Analysis Reporting System, National Highway Traffic Safety Administration, 2000; Miller, TR, L. Blincoe, Incidence and Cost of Alcohol-Involved Crashes in the United States in *Accident Analysis and Prevention*, 26:5, 583-592, 1994.

intent in drafting strict drunk driving laws as clearly stated in Wisconsin Statute § 967.055. [2] For that reason, the word "operate" must be given a consistent interpretation throughout the motor vehicle statutes.

ARGUMENT

The petitioners' position is that since the engine on the snowmobile was off, defendant-petitioner was not operating his snowmobile as defined in § 350.01(9r), Stats. MADD strongly disagrees with this position. Interpretation of the word "operate" as used in Chapter 350 of the Wisconsin Statutes should be in accord with its interpretation in other chapters of the statutes. To have different meanings for the term "operate" as it appears throughout the statutes will only create confusion and potentially erode the strength of Wisconsin's drunk driving laws. The Legislature intended that the statutes be read together. Indeed, sec. 346.02(10), Stats., makes thirty-four sections of chapter 346 (Rules of the Road) applicable to snowmobiles and their operators.

Furthermore, in 1991, the Wisconsin Legislature amended § 350.01(9r), Stats., in an effort to provide a ubiquitous meaning of the

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[2] *See also* Laws of Wisconsin 1981, Ch. 20 § 2051(13)(b), as amended by L. 1981, c. 184 § 10.

term "operate" in the statutes. *See* 1991 Wis. Laws Act 39 § 3233. Prior to 1991, § 350.01(9r) read: "'Operation of a snowmobile' means controlling the speed or direction of a snowmobile." *Id.* As amended, the Legislature took the term "drive" as defined in § 346.63(3)(a) and coupled it with the term "operate" as defined in § 346.63(3)(b), Rules of the Road. Noticeably absent in the amended snowmobile statute is the requirement from § 346.63(3)(a) that the vehicle be in motion for a person to "operate" it. The statute now reads: "'Operate' means the exercise of physical control over the speed or direction of a snowmobile [3] or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion." [4] § 350.01(9r), Stats. At issue then, is how this court will define "the exercise of physical control". Such a definition will impact the application of the intoxicated snowmobiler statute, § 350.101(1), Stats., and logically the OMVWI statute, § 346.63(1), Stats., which both include the "exercise of physical control" in their respective definitions of "operate".

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[3] § 346.63(3)(a) Exchanging "snowmobile" for "motor vehicle," and removing "while in motion."

[4] This is the exact definition of "operate" from § 346.63(b).

Both *Milwaukee County v. Proegler*, 95 Wis. 2d 614, 291 N.W. 2d 608 (Ct. App.1980) and *State v. Modory*, 204 Wis. 2d 538, 555 N.W. 2d 399 (Wis. Ct. App 1996), addressed the issue of when someone was in "physical control" of a vehicle under Wisconsin's OMVWI statute. The *Proegler* court held that restraining motion was as much exercising physical control as was intentionally causing motion. *Id.* at 628. The *Modory* court held that motion is not a required element in determining whether a defendant operated a car while intoxicated. *Id. at 543.*

The difference between *Proegler*, *Modory* and the present case is that the vehicle in the present case did not have its engine on, although the key was in the ignition. Both the defendant-appellant, and Judge Curley's dissent in *Burg v. Cincinnati Casualty Insurance Co.,* 2001 WI App. 241, 635 N.W.2d 622 (WI Ct. App. 2001), put significant weight behind this distinction in determining whether a person exercises "physical control" for the purposes of the term "operate". MADD contends that this is a distinction without a difference.

Clearly, it would frustrate the Legislature's intent to base a charge of operating while intoxicated on whether the defendant's engine was running at the time of apprehension. The *Modory* court

aptly identified the problem when it stated that "the purpose of the statute is to deter a person who is intoxicated from getting behind the wheel of a motor vehicle in the first instance, rather than to have a court or jury make a fine distinction later whether the person was in a position to cause harm." *Id.* at 544.

While this issue is one of first impression in Wisconsin, other jurisdictions have held that it is not necessary for an engine to be running before a person is considered to "operate" a vehicle in intoxicated use situations. MADD believes that the decisions from these jurisdictions clearly comport with Wisconsin public policy and serve as a useful guide to this Court. As in the present case, the issues these courts faced invariably rested on whether the defendant exercised physical control sufficient to "operate" the vehicle while intoxicated.

In interpreting Wyoming's drunk driving statute, § 31-5-233(a), the Wyoming Supreme Court held that a drunk motorist was in "actual physical control" of his vehicle when the police officer found him unconscious in his car, with the lights on, keys in the ignition but engine not running. *Adams v. State,* 697 P.2d 622 (Wyo. 1985). They stated that § 31-5-233(a) "is indicative of public policy of the state of Wyoming to discourage intoxicated persons from

making any attempt to enter a vehicle except as passengers or passive occupants." *Id.* at 625.

In *State v. Barnhart,* 850 P.2d 473 (Utah Ct. App. 1993), the Court of Appeals of Utah held that the defendant was in "actual physical control" of his vehicle in violation of Utah Code Ann. § 41-6-44(1) when the officer found the defendant unconscious or sleeping in his car, with the keys in the ignition, engine off. The court noted that "a person need not actually move, or attempt to move, a vehicle, but only needs to have an apparent ability to start and move the vehicle in order to be in actual physical control." *Id.* at 478.

The Supreme Court of Tennessee affirmed the conviction of a defendant who violated § 55-10-401 making it illegal to be "in actual physical control" of a vehicle while intoxicated. The defendant was sitting behind the wheel of his truck with the keys to his truck in his pocket. In so holding, the Court opined that "the Legislature, in making it a crime to be in physical control of an automobile while under the influence of an intoxicant, 'intended to enable the drunken driver to be apprehended before he strikes.'" *State v. Lawrence*, 849 S.W.2d 761, 765 (Tenn. 1993).

In *State v. Kitchens*, 498 N.W.2d 649 (S.D. 1992), the Supreme Court of South Dakota affirmed the defendant's conviction under S.D.L.C. § 32-23-1 for asserting "actual physical control" over his vehicle while intoxicated. The police found the defendant in this case passed out over the steering wheel of his truck. The truck engine was not engaged, and the officer found the keys in the defendant's pocket. In affirming the Court of Appeals decision holding that the keys need not be in the ignition to exercise requisite physical control, the court noted that "[t]he purpose of the 'actual physical control' offense is a preventative measure. We have long construed the actual physical control statute to broadly prohibit *any* exercise of dominion or control over a vehicle by an intoxicated person." *Id.* at 651-652 (emphasis added).

The Supreme Court of North Dakota held that the definition of "actual physical control" for the purposes of their drunk driving statute § 39-08-01, did not rest on the distinction that the engine was not engaged and the ignition off. *State v. Ghylin*, 250 N.W.2d 252 (N.D. 1977). They noted that "the real purpose of the statute is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers. As stated in *State v. Schuler, supra*, the 'actual physical control' offense is a

preventative measure intended to deter the drunken driver." *Id.* at 255.

In *State v. Eckert*, 186 Neb. 134 (Neb 1970), the Supreme Court of Nebraska held that circumstantial evidence supported the defendant's conviction for operating a motor vehicle while intoxicated in violation of § 60-6,196 of the Nebraska statutes when the officer found him unconscious at the wheel of his truck and the engine was not running.

The Court of Appeals of Alabama held that the defendant was in "actual physical control" of his vehicle in violation of Alabama code § 32-5A-191 when he was sitting at the wheel and the car keys were on the dashboard. *Barnett v. State*, 671 So. 2d 135 (Ala Ct. App. 1995). They held that "'[a]ctual physical control' is exclusive physical power, and the present ability, to operate, move, park, or direct whatever use or non-use is to be made of the motor vehicle at the moment." *Id.* at 137.

In *Kingsley v. State,* 11 P.3d 1001 (Alaska Ct. App. 2000), the Court of Appeals of Alaska affirmed the defendant's conviction for violating § 28.35.030 of the Alaska statutes. They held that the defendant was in "actual physical control" of his vehicle when he was behind the wheel, and had the car keys in his pocket. They

noted that a defendant's "attempt to operate a vehicle may furnish convincing proof that the person is in actual physical control of the vehicle, but a person may exercise actual physical control over a vehicle without making active attempts to operate it." *Id.* at 1003.

Affirming the circuit court decision in this case will only give aid to future intoxicated users who, once caught behind the wheel, attempt to escape prosecution because their engines were off. Such a policy decision will contravene two decades of work by MADD to strengthen the impaired driving statutes and "tighten the noose" on intoxicated drivers.

MADD urges this Court to adopt the public policy reasoning of these courts and join these jurisdictions in holding that it is not necessary for an engine to be running before a person is considered to "operate" a vehicle within the meaning of the statutes. Such a ruling will effectuate the public policy of the State of Wisconsin in drafting, and interpreting strict laws preventing the operation of a motor vehicle while intoxicated as it is clearly stated in Wisconsin Statute § 967.055. Furthermore, it will effectuate the legislative intent of the drafters and reinforce consistency of the term "operate" a vehicle within the Wisconsin Motor Vehicle Code.

CONCLUSION

For the foregoing reasons, Mothers Against Drunk Driving respectfully requests that this Court affirm the court of appeals decision finding that the defendant-appellant was exercising "actual physical control" and therefore "operating" his snowmobile as defined in § 350.01(9r), Stats., when he was sitting at the controls while the engine was off and with the key in the ignition.

Dated this 15th day of February, 2002.

Respectfully submitted,

SCHELBLE & PODBIELSKI, S.C.
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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

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Dated this 15th day of February, 2002.

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APPENDIX

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stricted solely to tort actions. Yet, no conclusive authority is cited for this conclusion. Conversely, Art. 10, § 4, Wyoming Constitution, says "* * * [S]uch fund shall be in lieu of, and shall take the place of *any and all rights of action against any employer* * * *." (Emphasis added.)

The majority imposes liability on the state to indemnify Befus by virtue of a "statutory indemnity contract." This concept sounds like a mutation or hybrid. To my knowledge a "statutory indemnity contract" has no legal basis. I do not feel the legislature in this state created such a concept. Even if there was such a concept, I seriously doubt the legislature ever meant it to apply to a situation such as this. Obviously the holding in this case has doubtful ramifications for future application. Furthermore, the "statutory indemnity contract" invented by the majority cannot be compared to an express or implied indemnity contract as discussed in *Pan American Petroleum Corporation v. Maddux Well Service*, supra.

In his dissent in the Pan American case, Justice Raper disagreed with allowing a third-party claim for indemnity from the employer, stating:

"The majority decision has rendered meaningless the concept of workmen's compensation that '"[i]n adopting the new system both employees and employers gave up something that they each might gain something else, and it was in the nature of a compromise; * * *."' *Stephenson v. Mitchell, ex rel. Workmen's Compensation Department*, Wyo.1977, 569 P.2d 95, quoting from *Zancanelli v. Central Coal & Coke Company*, 1918, 25 Wyo. 511, 173 P. 981. What they got was: '* * * The right of each employee to compensation from such fund *shall be in lieu of and shall take the place of any and all rights of action* against any employer contributing as required by law to such fund *in favor of any person or persons* by reason of any such injuries or death,' § 4, Art. X, Wyoming Constitution.

"But now, through the employment of an artful manipulation of words, misdirection of legal hypotheses and disregard for the clear language of the constitution, the employer does not have the insurance he has paid for. The employee now may indirectly, through use of a third party go-between, obtain an additional recovery from the employer he could not obtain directly. When that is the case, then as observed by the trial judge, 'it appears the constitutional immunity is nearly at an end.'" *Pan American Petroleum Corporation v. Maddux Well Service*, supra, at 1226–1227.

For the reasons stated, I would affirm the district court's disallowance of Befus' claim for indemnification, as well as the Hamlin claims.

Donald Mark ADAMS, Appellant (Defendant),

v.

The STATE of Wyoming, Appellee (Plaintiff).

No. 84–173.

Supreme Court of Wyoming.

April 9, 1985.

Defendant was convicted before the Natrona County Court, Stephen E. David-

could murder his employees and be absolutely immune from civil liability. Conversely, the heirs of a murdered employee could only collect worker's compensation. *Parker v. Energy Development Company*, Wyo., 691 P.2d 981 (1984); and *Baker v. Wendy's of Montana, Inc.*, Wyo., 687 P.2d 885 (1984).

Under the circumstances of this case, however, the majority is not so solicitous of the state of Wyoming as an employer paying into the worker's compensation fund. Under the authority of this case a plaintiff (Hamlin) can do indirectly what he could not do directly. He can use a straw man or conduit (Befus) and collect twice from the state.

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son, J., of being in actual physical control of his parked vehicle while intoxicated, and he appealed. The District Court of Natrona County, Dan Spangler, J., affirmed, and defendant appealed. The Supreme Court, Brown, J., held that: (1) the element of "actual physical control" contained in statute making it an offense for any person who is under the influence of intoxicating liquor to have actual physical control of any vehicle, was not unconstitutionally vague, and (2) evidence was sufficient to support a finding that defendant was in actual physical control of his vehicle at the time of his arrest.

Affirmed.

1. Automobiles ⇐316

The element of "actual physical control" contained in statute making it an offense for any person who is under the influence of intoxicating liquor to have actual physical control of any vehicle, was not unconstitutionally vague. W.S.1977, § 31–5–233(a).

2. Statutes ⇐188

Words of a statute are to be interpreted in their ordinary, everyday sense unless a contrary interpretation is indicated in the specific statute.

3. Automobiles ⇐332

Where former statute merely made it an offense for anyone to drive while under the influence of intoxicating liquor, new law which makes it an offense to "drive" or "have actual physical control" of any vehicle was intended by the legislature to apply to persons having control of a vehicle while not actually driving it or having it in motion. W.S.1977, § 31–5–233(a).

4. Automobiles ⇐332

Legislative intent in enacting the "actual physical control" portion of statute making it an offense for any person who is under the influence of intoxicating liquor to drive or be in actual control of any vehicle, was apprehending the intoxicated driver before he could do any harm by operating motor vehicle. W.S.1977, § 31–5–233(a).

5. Automobiles ⇐355(6)

Evidence that defendant was found unconscious and intoxicated in driver's seat behind the steering wheel of automobile 20 feet off the highway with the keys in the ignition in the off position, the lights off, and the engine not running was sufficient to support finding that defendant was in actual physical control of his vehicle at the time of his arrest. W.S.1977, § 31–5–233(a).

Donald L. Painter, Casper, for appellant (defendant).

A.G. McClintock, Atty. Gen., Gerald A. Stack, Deputy Atty. Gen., John W. Renneisen, Sr. Asst. Atty. Gen., Terry J. Harris, Asst. Atty. Gen., and Michael A. Blonigen, Asst. Atty. Gen., Cheyenne, for appellee (plaintiff).

Before THOMAS, C.J., and ROSE, ROONEY, BROWN and CARDINE, JJ.

BROWN, Justice.

Appellant was convicted of being in "actual physical control" of his parked vehicle while intoxicated. He raises two issues on appeal:

"I

"Whether the element of 'actual physical control' contained in Section 31–5–233(a), W.S.1977, is unconstitutionally vague?

"II

"Whether there existed sufficient evidence to support a finding that appellant was in 'actual physical control' of his vehicle at the time of his arrest * * *."

We will affirm.

On May 17, 1983, at approximately 11:30 p.m., appellant was found by Highway Patrolman Tom Chatt parked near Highway 220 between Casper and Rawlins, at or near Milepost 75, with his vehicle off the right side of the highway about 20 feet. The engine was not running, none of the

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lights were on, and the keys were in the ignition but in the off position. Appellant was unconscious and intoxicated. He was in the driver's seat behind the steering wheel.

When Officer Chatt arrived, appellant did not respond to audible stimuli but did awaken when shaken by the officer. Officer Chatt characterized appellant's conduct and bearing as a "little bit unsteady," but he did not stumble. His speech was either "slightly slurred" or "slightly slow speech." At times appellant appeared confused, but was at all times courteous and cooperative. Appellant stipulated that his blood alcohol reading was .152 shortly after his arrest, and the degree of his intoxication was not an issue at trial, nor is it an issue on appeal.

Appellant was charged with being in "actual physical control" of a motor vehicle while in an intoxicated condition which rendered him incapable of safely operating such vehicle. He was charged with violating § 31-5-233(a), W.S.1977, 1983 Cum. Supp.:

> "It is unlawful for any person who is under the influence of intoxicating liquor, to a degree which renders him incapable of safely driving a motor vehicle, to drive or have actual physical control of any vehicle within this state." [1]

Appellant was tried by the Honorable Stephen E. Davidson, Natrona County Judge, sitting without a jury, and found guilty. His conviction was affirmed by the district court sitting as an intermediate appellate court.

I

[1] Appellant contends that the words "actual physical control," contained in § 31-5-233(a), W.S.1977, are unconstitutionally vague and ambiguous. He did not designate a constitutional issue on appeal, nor was it raised in the courts below. Appellant merely states in his brief that the statute is unconstitutional but he cites no authority. We have not had an occasion to consider the constitutionality of § 31-5-233(a). However, other states have addressed the constitutional challenge that is now before us.

In 1956, Montana had a provision in its statute which utilized the term "actual physical control" in almost the identical manner as involved here. See § 32-2142(1) subd. (a) R.C.M.1947. The Montana Supreme Court held that the statute was "neither vague nor uncertain." *State v. Ruona*, 133 Mont. 243, 321 P.2d 615 (1958). The court stated:

> "* * * Using the term in 'actual physical control' in its composite sense, it means 'existing' or 'present bodily restraint, directing influence, domination or regulation.' Thus, if a person has existing or present bodily restraint, directing influence, domination, or regulation, of an automobile, while under the influence of intoxicating liquor he commits a misdemeanor within the provisions of [the statute]. * * *"

[2] In arriving at the above definition, the Montana court interpreted the words "actual," "physical," and "control" in their ordinary meaning. This is consistent with the general rule that words of a statute are to be interpreted in their ordinary, everyday sense unless a contrary interpretation is indicated in the specific statute. *Wyoming State Department of Education v. Barber*, Wyo., 649 P.2d 681 (1982).

We are satisfied with the Montana Supreme Court's definition of "actual physical control," and are persuaded that such definition is applicable to the Wyoming statute. We hold, therefore, that § 31-5-233(a), W.S.1977, is not unconstitutional because of vagueness or ambiguity. See also *Parker v. State*, Okla.Crim.App., 424 P.2d 997 (1967).

II

[3] Before 1981, § 31-5-233(a), W.S. 1977, made it an offense for anyone, who was under the influence of intoxicating liquor to a degree which rendered him incapable of safely driving a motor vehicle, to

1. Now § 31-5-233(a), W.S.1977 (November 1984 Replacement).

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drive any vehicle within the state. The legislature amended the statute in 1981. The word "drive" was retained, and the words "or have actual physical control of" were added in the disjunctive. Ch. 12, S.L. of Wyoming, 1981.

We conclude that the legislature intended that the present law cover factual situations not covered by the earlier statute, and more particularly, that the legislature intended that the law should apply to persons having control of a vehicle while not actually driving it or having it in motion. The new statute defines two different offenses, "driving a vehicle" while intoxicated and "having actual physical control of a vehicle" while intoxicated.

Appellant contends that there was no "actual physical control" under the circumstances of this case, that is, the vehicle lights were off, the engine was not running, the ignition key was in an "off" position, and the vehicle was off the road. Appellant cites the following cases to support his contention. *Key v. Town of Kinsey*, Ala.Crim.App., 424 So.2d 701 (1982); *State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983); *Garcia v. Schwendiman*, Utah, 645 P.2d 651 (1982); *State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442 (1971).

Other jurisdictions have held otherwise, and we believe their determination more nearly comports with Wyoming public policy. The controlling facts in *Hughes v. State*, Okla.Crim., 535 P.2d 1023 (1975), are almost identical to the facts in the case here. In Hughes, the keys were merely in the ignition and the accused was unconscious behind the wheel of his parked car.[2] The Oklahoma court found the accused to be in "actual physical control" of an automobile.[3] The court there said:

> "* * * We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had 'actual physical control' of the vehicle within the meaning of the statute. * * *" Id., at 1024.

An intoxicated person seated behind the steering wheel of an automobile is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving; however, the danger does exist and the degree of danger is only slightly less than when the vehicle is moving. As long as a person is physically or bodily able to assert dominion in the sense of movement by starting the car and driving away, then he has substantially as much control over the vehicle as he would if he were actually driving it. *State v. Webb*, 78 Ariz. 8, 274 P.2d 338 (1954); and *State v. Ruona*, supra.

[4] We believe that the legislative intent in enacting the "actual physical control" portion of § 31-5-233(a), W.S.1977, is apprehending the intoxicated driver before he can do any harm by operating a motor vehicle. *Mason v. State*, Okla.Crim., 603 P.2d 1146 (1979); and *Hughes v. State*, supra. Furthermore, the statute is indicative of public policy of the State of Wyoming to discourage intoxicated persons from making any attempt to enter a vehicle except as passengers or passive occupants. *Garcia v. Schwendiman*, supra.

[5] We believe there was sufficient evidence in this case to support the trial court's finding that appellant was "in actual physical control" of his vehicle at the time of his arrest.

Affirmed.

2. We learn some of the details of Hughes from *Mason v. State*, Okla.Crim., 603 P.2d 1146 (1979).

3. The applicable Oklahoma statute was 47 O.S. § 11-902, which in pertinent part, is almost identical to § 31-5-233(a), W.S.1977.

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ments of the State's offense of public intoxication were not met. Mere drunkenness or staggering is not sufficient under that statute. See *Thompson v. State*, 34 Ala. App. 608, 42 So.2d 640, cert. denied, 253 Ala. 63, 42 So.2d 642 (1949); Ala.Code § 13A–11–10 (1975) (Commentary)."

Congo v. State, 409 So.2d 475, 477 (Ala.Cr. App.1981), cert. denied, 412 So.2d 276 (Ala. 1982). The mere assertion by the arresting officer that the appellant was so drunk that she staggered or had difficulty walking does not alone support an inference that the appellant posed a danger to herself. Our conclusion would probably be different if there was clear evidence that the appellant was seen staggering down a highway or was driving a car. See *Cagle v. State*, 457 So.2d 463 (Ala.Cr.App.1984), in which a public intoxication conviction was upheld where the defendant endangered himself and others where she was drunk and staggering on the highway, and the testimony was that the defendant was so unsteady on his feet that he "could have stepped out in front of a car and hurt himself."

"Intoxication alone, however, is not prohibited by § 13A–11–10, Code of Alabama 1975. Our public intoxication statute is taken, almost verbatim, from the Model Penal Code provision. The commentary to the corresponding model code provision states that 'It is not the state of incapacitation *per se* that is condemned, but only its public manifestation in ways that may endanger the actor or inconvenience others. It follows that where the prospect of neither harm exists, there is no liability under Section 250.5' *Model Penal Code and Commentaries* § 250.5 at 376 (A.L.I. 1980)."

Cagle v. State, 457 So.2d 463, 465 (Ala.Cr. App.1984).

The appellant's adjudication of delinquency is due to be reversed and a judgment rendered in her favor.

REVERSED AND RENDERED.

All the Judges concur.

Roger Dale BARNETT

v.

STATE.

CR–94–688.

Court of Criminal Appeals of Alabama.

July 28, 1995.

Rehearing Denied Sept. 8, 1995.

Certiorari Denied Dec. 1, 1995
Alabama Supreme Court 1941923.

Defendant was convicted in the Tuscaloosa Circuit Court, John England, Jr., J., of driving under influence of alcohol (DUI), and he appealed. The Court of Criminal Appeals, Taylor, P.J., held that: (1) evidence supported conviction, and (2) officer had probable cause to believe that defendant had been driving on public highway and, thus, implied consent statute was applicable.

Affirmed.

1. Automobiles ⇐355(6)

There was sufficient evidence that defendant was in "actual physical control" of vehicle to support his conviction for driving under influence of alcohol (DUI); defendant was sitting in driver's seat of car, keys were on dashboard, within his reach, and arresting officer testified that car was operable and that hood was warm. Code 1975, § 32–5A–191(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐1144.13(3, 4, 5)

In determining whether there is sufficient evidence to support verdict of jury and judgment of trial court, Court of Criminal Appeals must accept as true evidence introduced by state, accord state all legitimate inferences therefrom, and view evidence in light most favorable to prosecution.

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3. Automobiles ⇐332

Persons may be found guilty of driving while under influence of alcohol (DUI) if they are in actual physical control of any vehicle while under influence of alcohol, and it is not necessary to be actually driving in order to be in "actual physical control"; actual physical control is exclusive physical power, and present ability, to operate, move, park, or direct whatever use or nonuse is to be made of motor vehicle at moment. Code 1975, § 32–5A–191(a)(2).

4. Automobiles ⇐332

Whether one is in "actual physical control" of vehicle for purposes of statute prohibiting driving under influence of alcohol (DUI), is determined by totality-of-circumstances test. Code 1975, § 32–5A–191(a)(2).

5. Automobiles ⇐355(6)

There was sufficient circumstantial evidence that defendant was actually driving his car while under influence of alcohol (DUI) to support his DUI conviction; officer testified that he received two radio dispatches reporting that defendant had been seen driving in area before officer saw defendant's car parked at third party's residence, and jury could have concluded that evidence presented excluded every reasonable hypothesis except that defendant had driven his car to that residence.

6. Criminal Law ⇐1144.13(3), 1159.6

In reviewing conviction based on circumstantial evidence, court must view evidence in light most favorable to prosecution; test to be applied is whether jury might reasonably find that evidence excluded every reasonable hypothesis except that of guilt.

7. Automobiles ⇐419

Officer had probable cause to believe that defendant had been driving on public highway and, thus, implied consent statute was applicable, even though defendant was parked off of highway at time of arrest; officer had received reports that defendant was driving in area and that he was intoxicated, officer knew defendant, knew where he lived, and knew what kind of car he drove, and officer received dispatch that defendant was at location of arrest causing disturbance. Code 1975, § 32–5–192.

8. Automobiles ⇐419

Implied consent statute is applicable where arresting officer has probable cause to believe that defendant was driving on highway, even if officer does not actually see defendant drive on highway. Code 1975, § 32–5–192.

Appeal from Tuscaloosa Circuit Court (CC–94–135); John England, Jr., Judge.

Andrew Smith, Tuscaloosa, for Appellant.

Jeff Sessions, Atty. Gen., and Jane Brannon, Asst. Atty. Gen., for Appellee.

TAYLOR, Presiding Judge.

The appellant, Roger Dale Barnett, was convicted of driving under the influence of alcohol (DUI), a violation of § 32–5A–191(a)(2), Code of Alabama 1975. He was sentenced to 90 days in jail.

The state's evidence tended to show that on December 4, 1994, the appellant was in actual physical control of his automobile while under the influence of alcohol. Assistant Chief Randy Kizziah of the Brookwood Police Department testified that he and the Tuscaloosa Sheriff's Department had received a dispatch to be on the lookout for a "primer orange" Ford Mustang automobile owned by Roger Dale Barnett, the appellant. He testified that he knew the appellant and that he knew the appellant drove a car that fit that description. A few minutes after receiving that dispatch, Kizziah received a dispatch that the appellant had been at a nearby store causing a problem and that he was very intoxicated. Again, he was told to be on the lookout for the appellant's vehicle. Kizziah testified that he did not go to the scene because he knew where the appellant lived and that the appellant would pass him on the highway if he was going home.

About 45 minutes later, Kizziah was dispatched to the residence of Joey Pate, the appellant's grandson, on a disturbance call. As he approached Pate's residence, he saw the appellant's car parked in front of a store

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next door to Pate's residence and about 15 feet off the highway. The appellant was sitting in the driver's seat. Kizziah testified that he called in the appellant's license plate number and confirmed that the car was registered to Roger Dale Barnett, the appellant.

He then walked over to the appellant's car and started talking to him. Kizziah testified that he could smell alcohol on the appellant's breath as he spoke. He asked the appellant to get out of his car. Kizziah testified that the appellant was very unsteady and that he had to use the car to support himself. He further testified that the appellant's eyes were bloodshot, that his face was flushed, and that his clothing was disheveled. Kizziah said that he felt the hood of the appellant's car and that it was still warm.

Kizziah asked the appellant to perform two field sobriety tests, the one-leg stand and walking a straight line. The appellant could not perform either without staggering. The appellant admitted that he had been drinking all day and that he was drunk. Kizziah saw two half-empty bottles of vodka in the appellant's car and the car keys on the dashboard. He got into the car and started it to make sure it was operable. He then placed the appellant under arrest for driving under the influence of alcohol.

The appellant was given an Intoxilyzer 5000 breath test to determine his blood alcohol content at the Tuscaloosa jail. The results of the test stated that his blood alcohol content was .207%.

The appellant testified in his own behalf at trial. He stated that he was drunk that day but that he did not drive his car. He testified that his friend Dale Whitsett drove him to Pate's residence. Whitsett testified that he drove the appellant to Pate's residence.

I

[1, 2] The appellant first contends that the evidence presented by the state was insufficient to find him guilty of driving under the influence of alcohol.

"In determining whether there is sufficient evidence to support the verdict of the jury and the judgment of the trial court, we must accept as true the evidence introduced by the state, accord the state all legitimate inferences therefrom, and view the evidence in the light most favorable to the prosecution. *McMillian v. State*, 594 So.2d 1253 (Ala.Cr.App.1991); *Faircloth v. State*, 471 So.2d 485 (Ala.Cr.App.1984), aff'd, 471 So.2d 493 (Ala.1985); *Cumbo v. State*, 368 So.2d 871 (Ala.Cr.App.), cert. denied, 368 So.2d 877 (Ala.1979)."

Underwood v. State, 646 So.2d 692, 695 (Ala.Cr.App.1993).

It is undisputed that the appellant was intoxicated at the time of his arrest. The appellant admitted it under oath at trial. Kizziah testified that the appellant was unable to successfully complete either of the field sobriety tests he administered. Also, the results of his Intoxilyzer 5000 breath test were .207%, well in excess of the .10% level at which one is presumed intoxicated under § 32-5A-194(b)(3), Code of Alabama 1975. This was sufficient evidence from which the jury could find that the appellant was under the influence of alcohol to the extent that it rendered him unable to operate a motor vehicle safely.

[3, 4] The appellant further contends that there was insufficient evidence to prove that he was actually driving the car. However, persons may be found guilty of driving under the influence under § 32-5A-191(a)(2) if they are "in actual physical control of any vehicle" while under the influence of alcohol. It is not necessary to be actually driving in order to be in actual physical control of a vehicle. *Sloan v. State*, 574 So.2d 975, 978 (Ala.Cr.App.1990). "Actual physical control" is exclusive physical power, and present ability, to operate, move, park, or direct whatever use or non-use is to be made of the motor vehicle at the moment. *Cagle v. City of Gadsden*, 495 So.2d 1144, 1145 (Ala.1986). Whether one is in "actual physical control" of a vehicle is determined by a totality-of-the-circumstances test. *Cagle*, 495 So.2d at 1145.

Here, the appellant was sitting in the driver's seat of his car; the keys were on the dashboard, within his reach. Kizziah testified that the car was operable and that the hood was warm. This was sufficient evidence from which the jury could find that the

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appellant was in "actual physical control" of the vehicle. *Cagle, supra; Sloan, supra; McLaney v. City of Montgomery*, 570 So.2d 881 (Ala.Cr.App.1990); *Beals v. State*, 533 So.2d 717 (Ala.Cr.App.1988); *Davis v. State*, 505 So.2d 1303 (Ala.Cr.App.1987).

[5, 6] Furthermore, there was circumstantial evidence presented from which the jury could have found that the appellant was actually driving his car while under the influence of alcohol.

> "In reviewing a conviction based on circumstantial evidence, this court must view that evidence in the light most favorable to the prosecution. The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; *not whether such evidence excludes every reasonable hypothesis of guilt, but whether a jury might reasonably so conclude.*"

Cumbo v. State, 368 So.2d 871, 874 (Ala.Cr.App.1978), writ denied, 368 So.2d 877 (Ala.1979). (Emphasis added.)

Kizziah testified that he had received two radio dispatches reporting that the appellant had been seen driving in the area before Kizziah saw the appellant's car parked at Pate's residence. The jury could have concluded that the evidence presented excluded every reasonable hypothesis except that the appellant had driven his car to Pate's residence. We will not substitute our judgment for that of the jury. *Owens v. State*, 597 So.2d 734, 737 (Ala.Cr.App.1992).

II

[7] The appellant next contends that the trial court erred by allowing the results of his Intoxilyzer 5000 breath test to be received into evidence. More specifically, he contends that because he was not arrested on a public highway, the implied consent statute, § 32–5–192, Code of Alabama 1975, does not apply to him.

Section 32–5–192 provides:

> "(a) Any person who operates a motor vehicle upon the *public highways* of this state shall be deemed to have given his consent, subject to the provisions of this division, to a chemical test or tests of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if *lawfully arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle on the public highways of this state while under the influence of intoxicating liquor.* The test or tests shall be administered at the direction of a law enforcement officer having *reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this state while under the influence of intoxicating liquor.* The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of 90 days; provided if such person objects to a blood test, the law enforcement agency shall designate that one of the other aforesaid tests be administered."

(Emphasis added.)

The appellant bases his contention on this court's holding in *Lunceford v. City of Northport*, 555 So.2d 246 (Ala.Cr.App.1988). In *Lunceford*, this court held that when a defendant is arrested for DUI and there is *no* evidence that he had been driving on a public highway, then the defendant is not subject to the implied consent statute. *Lunceford*, 555 So.2d at 249–49. Therefore, in that situation a defendant cannot be compelled to submit to a chemical test without his consent. 555 So.2d at 249.

[8] However, this court did not hold in *Lunceford* that merely being arrested on private property exempts DUI offenders from the implied consent statutes. "The implied consent statute is applicable where the arresting officer has probable cause to believe that the defendant had been driving on a highway even though he did not actually see the defendant drive on the highway." 555 So.2d at 249. Here, Kizziah had received reports that the appellant was driving in the area and that he was intoxicated. Kizziah knew the appellant, knew where he lived, and knew what kind of car he drove. He then

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received a dispatch that the appellant was at Pate's house causing a disturbance. This information and Kizziah's personal knowledge supplied him with probable cause to believe that the appellant had been driving on a public highway.

We hold that the trial court did not err by allowing the appellant's Intoxilyzer 5000 test results to be received into evidence.

For the foregoing reasons, the judgment in this case is due to be, and it is hereby, affirmed.

AFFIRMED.

All the Judges concur.

C.D.J.

v.

STATE.

CR–94–117.

Court of Criminal Appeals of Alabama.

July 28, 1995.

Rehearing Denied Sept. 8, 1995.

Certiorari Denied Nov. 22, 1995
Alabama Supreme Court 1941947.

Juvenile was adjudicated delinquent in the Jefferson Juvenile Court, Sandra Ross, J., of conduct which, if committed by adult, amounted to possession of short-barreled shotgun and carrying pistol on premises not his own, and he appealed. The Court of Criminal Appeals, Taylor, P.J., held that: (1) evidence was sufficient to establish that juvenile had knowledge of gun and was in possession of gun, but (2) evidence was insufficient to adjudicate juvenile delinquent for conduct, if committed by adult, amounting to carrying pistol on premises not his own.

Affirmed in part; reversed in part.

1. **Criminal Law** ⇐1144.13(3, 4, 5)

In determining whether there is sufficient evidence to support verdict of jury and judgment of trial court, reviewing court must accept as true evidence introduced by state, accord state all legitimate inferences therefrom, and view evidence in light most favorable to prosecution.

2. **Infants** ⇐176

Testimony of arresting police officer that sawed-off shotgun found in juvenile's vehicle was 12 inches long and had overall length of 20.5 inches was sufficient to prove that weapon was covered by short-barreled shotgun statute. Code 1975, § 13A–11–62(5).

3. **Infants** ⇐176

Evidence that witness saw shots fired from front passenger seat of car in which juvenile was passenger, that shotgun found in car was warm when police officer stopped juvenile, that there was spent shell still in gun's chamber, and that gun could have been passed from front seat to hatchback where it was found was sufficient to establish that juvenile had knowledge of gun and was in possession of gun, for purposes of delinquency adjudication for possession of sawed-off shotgun. Code 1975, § 13A–11–62(5).

4. **Drugs and Narcotics** ⇐65

Mere presence of defendant in automobile containing contraband is not sufficient in and of itself to support conviction for possession of controlled substance; knowledge of presence of controlled substance by defendant must also be established beyond reasonable doubt.

5. **Criminal Law** ⇐338(2)

Circumstantial evidence may be used to prove defendant's knowledge of contraband in his vehicle.

6. **Infants** ⇐153, 176

Evidence was insufficient to adjudicate juvenile delinquent for conduct, if committed by adult, amounting to carrying pistol on premises not his own, where state did not present proof that juvenile did not have license to carry pistol. Code 1975, §§ 13A–11–52; 13–A–11–73.

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fering with arrest if, knowing that a peace officer is making an arrest [and] with the intent of preventing the officer from making the arrest, the person resists ... arrest ... by force."[7] Jones admits that he knew that the officers were peace officers and that he struggled. But he contends that the state did not prove either that the officers were making an arrest at the time he was resisting, or that Jones knew this and intended to prevent the officers from making the arrest.

[2] Judge Card found that Jones resisted the police and this finding is clearly supported by the record. But Jones initially resisted an investigative stop and later a search. There is no evidence that Jones was ever told that he was under arrest. Although it is not invariably necessary for the state to prove that a person was explicitly told that he was under arrest in order to prove that the person knew that he was under arrest, the state must prove that the defendant was otherwise aware of the arrest. It is unclear when the police actually arrested Jones, and for what. In order to convict Jones of resisting arrest, the state had to prove that the police were arresting Jones, that Jones knew the officers were arresting him, and that Jones used force with the intent to prevent the officers from making the arrest. Since Judge Card's findings did not focus on these elements, and the existence of these elements is not obvious from the record, we conclude that we should remand this case to Judge Card for further findings.

The case is remanded to the superior court. On remand, the court shall dismiss the charge of misconduct involving a controlled substance in the fourth degree. The court shall, within sixty days, reconsider and make additional findings on the charge of resisting arrest. In the event that the superior court makes findings convicting Jones of the offense, the parties will have thirty days after the issuance of those findings to submit memoranda addressing those findings to this court. We retain jurisdiction.

[7] AS 11.56.700(a)(1).

REVERSED in part, REMANDED in part.

Greg E. KINGSLEY, Appellant,

v.

STATE of Alaska, Appellee.

No. A–7288.

Court of Appeals of Alaska.

Nov. 9, 2000.

Defendant was convicted in the District Court, Third Judicial District, Homer, M. Francis Neville, J., of driving while intoxicated (DWI), and he appealed. The Court of Appeals, Mannheimer, J., held that: (1) evidence was sufficient to support conviction, and (2) trial court was not required to instruct jury to decide whether defendant's car was operable.

Affirmed.

1. Automobiles ⇐332

An intoxicated person can commit crime of driving while intoxicated (DWI) without "driving" or "operating" a car in the usual sense; statute criminalizing driving while intoxicated is violated whenever an intoxicated person is in actual physical control of a motor vehicle. AS 28.35.030(a), 28.40.100(a)(7).

2. Automobiles ⇐355(6)

Evidence was sufficient to support conviction for driving while intoxicated (DWI), though engine of vehicle was not running and defendant had made no active attempt to start engine, where defendant was sole occupant of his vehicle, he was sitting behind steering wheel, and he had keys to vehicle in his pocket. AS 28.35.030(a), 28.40.100(a)(7).

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3. Automobiles ⇐332, 355(6)

For purposes of statute criminalizing driving while intoxicated (DWI), a person's attempt to operate a vehicle may furnish convincing proof that the person is in actual physical control of the vehicle, but a person may exercise actual physical control over a vehicle without making active attempts to operate it. AS 28.35.030(a), 28.40.100(a)(7).

4. Automobiles ⇐357

Trial court was not required to instruct jury that a defendant cannot be convicted of driving while intoxicated (DWI) under a "physical control" theory unless jury affirmatively finds that the defendant's car was operable, or was reasonably capable of being rendered operable; evidence supported finding that defendant's car was operable or reasonably capable of being rendered operable, as defendant was driving car when it slid into snow bank, and there was no evidence that car ceased to be operable one it became stuck in the snow and could no longer be moved without assistance of towing equipment. AS 28.35.030(a), 28.40.100(a)(7).

5. Automobiles ⇐357

If operability of the defendant's car is not in reasonable dispute, jury need not be instructed that defendant cannot be convicted of driving while intoxicated (DWI) under a "physical control" theory unless jury affirmatively finds that the defendant's car was operable, or was reasonably capable of being rendered operable. AS 28.35.030(a), 28.40.100(a)(7).

Darin B. Goff, Assistant Public Defender, Kenai, and Barbara K. Brink, Public Defender, Anchorage, for Appellant.

Mary S. Pieper, Assistant District Attorney, Dwayne W. McConnell, District Attorney, Kenai, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before COATS, Chief Judge, MANNHEIMER and STEWART.

OPINION

MANNHEIMER, Judge.

[1] The crime defined in AS 28.35.030(a) is usually referred to as "driving while intoxicated". The text of this statute speaks of a person who "operates or drives a motor vehicle". Nevertheless, an intoxicated person can commit this crime without "driving" or "operating" a car in the usual sense. The statute is violated whenever an intoxicated person is in actual physical control of a motor vehicle.[1]

Greg E. Kingsley drove his car into a snow berm, where it remained stuck despite his efforts to extricate it. Kingsley turned the engine off, but he continued to sit in the driver's seat. Kingsley testified that while he sat there, he consumed a bottle of whiskey and became intoxicated. Based on this evidence, Kingsley was convicted of driving while intoxicated.[2]

Kingsley concedes that he was in actual control of his car while he was intoxicated. Nevertheless, he contends that there were reasons why he could not lawfully be convicted of driving while intoxicated.

Was there sufficient evidence to support the verdict?

[2] The first reason for reversing the conviction, Kingsley argues, is that the State failed to prove that he was operating a motor vehicle. Kingsley notes that the engine of his car was not running and the State presented no evidence that Kingsley attempted to start the car after he became intoxicated.

But, as explained above, the State did not need to prove that Kingsley operated the vehicle while intoxicated. The crime of "driving while intoxicated" would be established if the State proved that Kingsley exer-

1. *See Department of Public Safety v. Conley*, 754 P.2d 232, 234 (Alaska 1988); *Mezak v. State*, 877 P.2d 1307, 1308 (Alaska App.1994). *See also* AS 28.40.100(a)(7), which defines "driver" as "a person who drives or is in actual physical control of a vehicle".

2. Actually, there was conflicting evidence as to when Kingsley had done his drinking. Viewing the evidence in the light most favorable to the State, Kingsley was intoxicated when he drove the car into the snow berm. But to resolve this case, we must take the evidence in the light most favorable to Kingsley.

cised actual physical control over the vehicle while he was intoxicated.

As Kingsley acknowledges in his brief to this court, a person who engages the engine of a vehicle and allows it to run is not merely exercising physical control over the vehicle but is also "operating" it. Thus, if the engine of Kingsley's vehicle had been running when the police arrived, the State might have proved that Kingsley was operating the vehicle while intoxicated. But the State had to prove only that Kingsley was in actual physical control of the vehicle while intoxicated.

The supreme court held in *Department of Public Safety v. Conley*[3] that a person can exercise "physical control" over a motor vehicle (and thus be convicted of driving while intoxicated) even though the vehicle's engine is not running. In *Conley*, the court ruled that an intoxicated person committed DWI when she got behind the wheel, announced her intention to drive, and tried to insert her key into the ignition.[4] This court reached a similar result in *Mezak v. State*[5], where we held that the defendant was properly convicted of operating a water craft while intoxicated when the evidence showed that he actively (but unsuccessfully) tried to start the boat's engine.[6]

[3] It is true that *Conley* and *Mezak* involved defendants who did something to try to put their vehicles in motion. But we do not believe that such actions are necessary to prove that a defendant is in "actual physical control" of a vehicle. A person's attempt to operate a vehicle may furnish convincing proof that the person is in actual physical control of the vehicle, but a person may exercise actual physical control over a vehicle without making active attempts to operate it. In this case, Kingsley was the sole occupant of his vehicle. He was sitting behind the steering wheel, and he had the keys to the vehicle in his pocket. Under these facts, Kingsley was in "actual physical control" of the vehicle even though the engine was not running and even though Kingsley made no active attempt to start the engine.

Was the trial judge required to instruct the jury to decide whether Kingsley's vehicle was operable?

[4] Kingsley offers a second reason why his conviction should be reversed. He contends that, under Alaska law, a defendant can not be convicted of DWI under a "physical control" theory unless the government proves that the defendant's vehicle was operable at the time. Kingsley points out that his trial judge never instructed the jury on the issue of operability. He concludes that, because the jurors received no instruction on operability (and assumedly never deliberated on this issue), the jury's verdict is flawed.

Kingsley relies on the supreme court's decision in *Conley*. *Conley* was an appeal from an administrative revocation of a driver's license based on proof that the license-holder exercised actual physical control over a motor vehicle while intoxicated. The supreme court declared that one element of the government's proof was to show that the defendant's vehicle was "reasonably capable of being rendered operable".[7] However, the court also held that, even though the government failed to offer evidence on the issue of operability, the hearing officer was "entitled to infer operability in the absence of evidence to the contrary".[8]

In Kingsley's case, all of the evidence supported a finding that his vehicle was operable or reasonably capable of being rendered operable. Kingsley was driving the car when it slid into the snow bank. Although the car became stuck in the snow and could no longer be moved (without the assistance of towing equipment), there was no evidence that the car ceased to be operable. This court confronted a similar issue in *Lathan v. State*, where we held that the defendant's vehicle remained "operable" even though it was

3. 754 P.2d 232 (Alaska 1988).

4. *Id.* at 236.

5. 877 P.2d 1307 (Alaska App.1994).

6. *Id.* at 1308.

7. *Conley*, 754 P.2d at 236

8. *Id.*

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firmly stuck in deep mud and no longer capable of movement under its own power.[9]

[5] Thus, in the final analysis, Kingsley's argument poses the following question: Even when there is no evidence to support a finding that a defendant's vehicle was inoperable, must the trial jury nevertheless be instructed that the defendant can not be convicted of driving while intoxicated under a "physical control" theory unless the jury affirmatively finds that the defendant's car was operable (or was reasonably capable of being rendered operable)? We hold that the answer is "no". If the operability of the defendant's car is not in reasonable dispute, the jury need not be instructed on this issue.

Under *Conley*, when the government pursues a "physical control" theory of DWI, the government must prove that the defendant's vehicle was either operable or reasonably capable of being rendered operable. We assume for purposes of deciding Kingsley's appeal that *Conley*'s requirement of operability applies in criminal cases as well as license revocation cases.[10] But even with this assumption, we conclude that the jury need not make a finding of operability unless there is evidence suggesting the contrary—evidence suggesting that the defendant's vehicle was both inoperable and not reasonably capable of being rendered operable.

A similar legal issue used to be presented in murder cases before the enactment of modern criminal codes. The common-law definition of murder required proof of "malice". Generally speaking, in cases of intentional homicide, "malice" meant that the defendant was of sound mind and that there was no justification, excuse, or mitigation for the killing.[11] But even though "malice" was an element of the government's proof, malice was presumed if (1) the government proved that the defendant committed an intentional homicide and (2) there was no evidence suggesting insanity, justification, excuse, or mitigation.

> There [was] a true presumption of malice aforethought. It would be an unreasonable burden upon the prosecution to require it in every murder case to prove not only the killing of the deceased by the defendant, but also the non-existence of every conceivable set of circumstances which might be sufficient to constitute either innocent homicide or guilt of manslaughter only. Thus the prosecution [was] not required to prove in the first instance . . . that the defendant was not insane as to be wanting in criminal responsibility, or that the killing was not by accident or that it did not result from the proper use of deadly force[,] or that it did not result from the sudden heat of passion engendered by adequate provocation, or other matters of this kind. To require such proof would constitute an absurd waste of time, and would require proving in many instances the absence of a non-existent circumstance. This difficulty [was] avoided by a rule of law in the form of a presumption.... Every homicide [was] presumed to have been committed with malice aforethought unless the evidence . . . [suggested that the killing was] without malice.
>
> [In murder prosecutions under common law, this] presumption . . . merely placed upon the defendant the burden of going forward with . . . evidence [that] throw[s] a different light upon the situation or indicates exculpating or mitigating circumstances. [But if] no such evidence is offered[,] a conviction of murder is proper because of the presumed malice.

R. Perkins & R. Boyce, *Criminal Law* (3rd edition 1982), pp. 76–78 (internal quotations and citations omitted).

When the supreme court decided *Conley*, the court seemingly adopted the same approach to the issue of operability. The court declared that, even though the government failed to introduce any evidence specifically addressed to proving that Conley's car was

9. 707 P.2d 941, 943 (Alaska App.1985).

10. We made a similar assumption in *Williams v. State*, 884 P.2d 167, 170 (Alaska App.1994).

11. *See* R. Perkins & R. Boyce, *Criminal Law* (3rd edition 1982), pp. 58–59, 951.

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operable, the hearing officer (*i.e.*, the trier of fact) was "entitled to infer operability in the absence of evidence to the contrary".[12]

We conclude that a similar rule should govern the issue of operability in criminal trials where a defendant is charged with driving while intoxicated under a "physical control" theory (that is, where the government does not prove that the defendant drove or operated the motor vehicle). Unless there is evidence suggesting that the defendant's vehicle was *not* operable *and not* reasonably capable of being rendered operable, the jury need not be instructed on the operability issue.

12. *Conley*, 754 P.2d at 236.

Conclusion

For these reasons, we conclude (1) that the State presented sufficient evidence to establish that Kingsley was in actual physical control of a motor vehicle while intoxicated, and (2) the trial judge did not need to instruct Kingsley's jury on the issue of operability.

The judgement of the district court is AFFIRMED.

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should have anticipated the need for him before trial and so have notified defense counsel. It is clear the State did not know the defendant was going to testify at trial until opening arguments. Even the trial judge remarked "it was my impression this morning that the defendant was not going to testify.... [I]t was somewhat of a surprise to me at noon when you said he was going to testify." From all that appears, defendant injected a degree of surprise into the proceedings and the State simply reacted by contacting a witness known to have some expertise in the relevant area. The State in this case appropriately responded to an exigency at trial and notified defense counsel as soon as possible that an expert rebuttal witness had been successfully contacted, who he was, and what his general purpose would be.

We hold that the State was not precluded from calling a rebuttal witness not disclosed before trial in circumstances where it, in good faith, had no reason to expect the need for such witness before trial.

CONCLUSION

Defendant failed to meet his burden for the claim that he was deprived of the effective assistance of counsel. We also find no merit in defendant's claims that the court erred in not submitting his requested jury instruction and in allowing the State to call an expert rebuttal witness. The defendant's conviction for burglary and theft is therefore affirmed.

GARFF and GREENWOOD, JJ., concur.

STATE of Utah, Plaintiff and Appellee,

v.

Kelly S. BARNHART, Defendant and Appellant.

No. 920357–CA.

Court of Appeals of Utah.

March 31, 1993.

Defendant was convicted for being in actual physical control of motor vehicle while under influence of alcohol after police officer found motorist unconscious in driver's seat with key in car's ignition by the Fifth District Court, Washington County, James L. Shumate, J. Defendant appealed. The Court of Appeals, Bench, J., held that: (1) correction-of-error standard of review applied; (2) fact that motorist left keys in ignition while sober was not dispositive; (3) finding of actual physical control did not require that motorist touch any operating controls; (4) motorist's subjective intent that his girlfriend drive car away was irrelevant; and (5) motorist's unconscious condition did not prevent finding of actual physical control.

Affirmed.

Garff, J., concurred in result.

1. **Criminal Law** ⇐1158(1)

Whether trial court operated within proper field of inquiry when making its ultimate factual findings concerning whether intoxicated motorist was in actual physical control of vehicle is determination which appellate court makes using correction-of-error standard of review. U.C.A. 1953, 41–6–44(1).

2. **Criminal Law** ⇐1158(1)

Appellate court defers to trial court's judgment of debatable issue made within proper realm of factual inquiry, such as finding based on totality of circumstances; no-correction-of-error standard allows appellate court to review incorrect trial court's determination of legal content of ultimate finding.

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3. Criminal Law ⇐1158(1)

Under correction-of-error standard, particularly where trial court had applied totality of circumstances test, appellate court must identify specific error made by trial court before disturbing trial court's finding.

4. Criminal Law ⇐1158(1)

Under correction of error standard of review, trial court has not committed reversible error if appellate court cannot clearly articulate legal guideline that trial court has violated in making its ultimate finding of fact.

5. Automobiles ⇐355(6)

Finding that intoxicated motorist was in actual physical control of vehicle was supported by evidence that motorist was sole occupant of car, ignition key was in ignition, car was located in parking lot of store with direct access to public streets, motorist was sitting upright in driver's seat, and only impairment of motorist's ability to drive car away was debilitating effect of alcohol. U.C.A.1953, 41–6–44(1).

6. Automobiles ⇐332

In deciding whether intoxicated motorist was in actual physical control of vehicle, trial court must look to totality of circumstances, no single factor being dispositive as matter of law. U.C.A.1953, 41–6–44(1).

7. Automobiles ⇐332

Intoxicated motorist need not actually move or attempt to move vehicle to be found in actual physical control, but motorist needs to have apparent ability to start and move vehicle. U.C.A.1953, 41–6–44(1).

8. Automobiles ⇐332

Fact that motorist placed keys in ignition of car while sober did not preclude finding that motorist was in actual physical control of car after becoming intoxicated where motorist had apparent ability to start and move car. U.C.A.1953, 41–6–44(1).

9. Automobiles ⇐332

Absence of evidence that motorist touched controls in attempt to operate vehicle did not preclude finding that motorist was in actual physical control of vehicle while intoxicated. U.C.A.1953, 41–6–44(1).

10. Automobiles ⇐332

Whether intoxicated motorist has subjective intent to operate vehicle is irrelevant to whether motorist had present ability to start and move vehicle as needed to find motorist in actual physical control of vehicle. U.C.A.1953, 41–6–44(1).

11. Automobiles ⇐332

Motorist's unconscious condition which resulted from imbibing alcohol did not prohibit finding that motorist was in actual physical control of vehicle. U.C.A.1953, 41–6–44(1).

Phillip L. Foremaster (argued), St. George, for defendant and appellant.

Eric A. Ludlow, Washington County Atty., and Wade A. Farraway (argued), Deputy Washington County Atty., St. George, for plaintiff and appellee.

Before BENCH, GARFF and JACKSON, JJ.

OPINION

BENCH, Judge:

Defendant, Kelly Barnhart, appeals his conviction for being in actual physical control of a motor vehicle while under the influence of alcohol in violation of Utah Code Ann. § 41–6–44(1) (1988). We affirm.

BACKGROUND

The parties do not dispute the basic facts. Defendant stipulated that the police report was accurate insofar as it concerned the period of time when the police were involved. The parties also stipulated to several additional facts. Finally, the trial court made additional factual findings of its own based upon the police report and the stipulated facts. We recite the facts accordingly.

On March 24, 1992, between 8:00 and 9:00 p.m., defendant drove his girlfriend's car to the grocery store in order to meet her. Defendant's intent was that his girl-

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friend would drive the car home. Prior to driving to the store, defendant had consumed two cans of beer. While waiting in the car for his girlfriend, defendant consumed an additional seven cans of beer.

At approximately 10:00 p.m., the store manager called the police because the store had closed and defendant was still in the parking lot. When a police officer arrived, he found defendant sitting upright in the driver's seat with his head back. The keys were in the ignition but the car was not running and the engine was cold.

According to the officer, defendant was either sleeping or unconscious. The officer tapped on the window, but defendant did not respond. The officer then pounded on the door with his fist and defendant still did not respond. Finally, the officer opened the door and shook defendant until he awoke. He was "very disoriented" and the officer noticed a strong odor of alcohol on defendant's breath and in the car. When asked by the officer where the owner of the car was, defendant pointed to the empty passenger seat. Defendant could not tell the officer where she was.

The officer conducted field sobriety tests and determined that defendant was intoxicated. During the course of the officer's investigation, defendant's girlfriend arrived. Defendant was placed under arrest and taken to jail. Testing at the jail showed a blood-alcohol level of .18%.

The trial court found that defendant was unconscious and not merely asleep when the officer arrived, and that although defendant was the sole occupant of the car, he did not intend to drive the car away from the store. The trial court also found that when defendant drove to the store he was not under the influence of alcohol to a degree that would have rendered him in violation of the law at the time. Finally, the trial court made the following finding:

> I find specifically that you had possession of the ignition key, and it was in the ignition of the vehicle, and that you had the ability to start and move the vehicle, absent the fact that you appeared to be unconscious from the effects of the alcohol. But there was no other intervening factor other than the alcohol itself prohibiting you from starting and moving the car.

The trial court found defendant guilty of being in actual physical control of a vehicle while intoxicated. Defendant was then sentenced, but the sentence was stayed pending this appeal.

STANDARD OF REVIEW

[1] Defendant challenges the trial court's finding that he was in "actual physical control" of the vehicle, as proscribed by Utah Code Ann. § 41-6-44(1) (1988). Ultimate factual determinations such as this are limited by legal principles that guide a trial court in its factfinding function. *See State v. Thurman*, 846 P.2d 1256, 1268-1272 (Utah 1993). These legal guidelines create a field of inquiry within which the trial court can make its ultimate factual findings. *State v. Richardson*, 843 P.2d 517, 521-22 (Utah App.1992) (Bench, P.J., concurring). Whether or not a trial court operated within the proper field of inquiry is a determination we make using a correction-of-error standard of review. *See Thurman*, 846 P.2d at 1271-1272; *Richardson*, 843 P.2d at 522 (Bench, P.J., concurring).

As the supreme court reasoned in *Thurman*, multi-judge appellate courts are better suited to establish the legal guidelines trial courts must apply when making ultimate factual findings. 846 P.2d at 1271-1272. By utilizing a correction-of-error standard, appellate courts are able to ensure that trial courts statewide correctly identify and follow the same legal standards in making ultimate factual findings. This standard also allows appellate courts to uniformly adjust the field of inquiry within which trial courts must make their ultimate findings of fact. *See id.* ("each new opinion narrows the universe of unsettled questions"); *see also Richardson*, 843 P.2d at 524-25 (Bench, P.J., concurring) (if injustice occurs because of disparate treatment of similar facts by different trial courts, "the field of inquiry should be restricted by adjusting the governing law").

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[2] We do not, however, apply the correction-of-error standard to every aspect of a trial court's finding of ultimate fact. The correction-of-error standard is intended to allow us to review and correct the trial court's determination of "the legal content" of an ultimate finding. *Thurman*, 846 P.2d at 1271–1272. We defer, on the other hand, to the trial court's findings of underlying facts. *Id.* Consequently, we defer to a trial court's judgment of a debatable issue made within the trial court's proper realm of factual inquiry, such as a finding based on the totality of the circumstances. As the supreme court noted in *Thurman:* "the appellate court addresses itself to the clarity and correctness of the developing law." *Id.* (quoting *State v. Vigil*, 815 P.2d 1296, 1300 (Utah App.1991)).

If an appellant asserts that the trial court has incorrectly identified the legal guidelines establishing its permissible field of inquiry, we use the correction-of-error standard because the appellant has challenged the "legal content" of the trial court's finding. If, on the other hand, an appellant cannot show that the trial court's ultimate finding was erroneous as a matter of law, the appellant is requesting nothing more than a second opinion on a debatable question of fact. In such cases, an appellant is simply challenging the trial court's judgment in its ultimate factual finding. Absent a violation of legal guidelines, a trial court's finding of ultimate fact remains on the same level as any other underlying factual finding, and we defer. *See Lopez v. Schwendiman*, 720 P.2d 778, 780 (defer to trial court's finding of actual physical control unless trial court misapplied the law or the finding was clearly against the weight of the evidence); *Garcia v. Schwendiman*, 645 P.2d 651, 653 (Utah 1982) (same).

Our use of the correction-of-error standard when reviewing a trial court's compliance with the legal guidelines does not allow us to substitute our judgment for that of the trial court simply because we would have reached a different result. *State v. Howard*, 544 P.2d 466, 468 (Utah 1975); *Pitcher v. Lauritzen*, 18 Utah 2d 368, 371, 423 P.2d 491, 493 (1967); *Richardson*, 843 P.2d at 524–25 (Bench, P.J., concurring); *Cf. Thurman*, 846 P.2d at 1271–1272. "The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside." *State v. Walker*, 743 P.2d 191, 193 (Utah 1987) (quoting Wright & Miller, *Federal Practice and Procedure* § 2585 (1971)).

[3, 4] If we could simply substitute our judgment in each new case, then each new opinion would not "narrow[ ] the universe of unsettled questions of appellate review." *Thurman*, 846 P.2d at 1271. Under the correction-of-error standard, particularly when the trial court has applied a totality of the circumstances test, an appellate court must identify the specific error made by the trial court before disturbing the trial court's finding. Only by clearly identifying the legal error of the trial court does the appellate court's ruling achieve the desired effect of harmonizing and developing the legal guidelines. *See id.; see also State v. Vigil*, 815 P.2d 1296, 1300 (Utah App.1991) (when reviewing ultimate findings, appellate courts address "the clarity and correctness of the developing law in order to provide unambiguous direction"). If the appellate court cannot clearly articulate a legal guideline that the trial court has violated in making its ultimate finding of fact, the trial court has not committed reversible error. The finding of an ultimate fact thereby remains a factfinding function of the trial court to which we defer. *Richardson*, 843 P.2d at 522 (Bench, P.J., concurring).

In the instant case, defendant raises several factors that he claims prevent a finding of actual physical control. In other words, he contends that as a matter of law the trial court could not have made the ultimate factual finding it made. His claims go directly to the legal guidelines that define the trial court's field of inquiry. In order for defendant to succeed, we must be persuaded to rule, as a matter of law, that the factors he points to prevented the trial court from properly finding that he had actual physical control. Otherwise, the trial court's finding that defendant was in

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actual physical control remains factual in nature, and we defer.

ANALYSIS

Defendant recites the fact situations of several "actual physical control" cases and attempts to draw factual similarities and distinctions that he believes are determinative in this case. We review those cases to discover the previously established legal guidelines in this area.

In *Garcia v. Schwendiman*, 645 P.2d 651 (Utah 1982), Garcia was in his vehicle attempting to start its motor, but apparently was unable to do so because of his intoxicated state. In front of Garcia's car was a fence and behind his car was another car—parked there by a concerned observer who had noticed Garcia's intoxicated condition. Garcia was unable to move the vehicle more than a few feet. The supreme court held that inasmuch as there was evidence that Garcia "occupied the driver's position behind the steering wheel, with possession of the ignition key and with the apparent ability to start and move the vehicle," there had been an adequate showing of actual physical control. *Id.* at 654. Noting that the objective of the statute is to prevent intoxicated persons from causing harm with a vehicle, the court rejected defendant's claim that his inability to move his car prevented him from having actual physical control. We gather the following legal guideline from the supreme court's holding: A person need not actually move, or attempt to move, a vehicle in order to have actual physical control; the person only needs to have "the apparent ability to start and move the vehicle." *Id.* at 654.

In *Lopez v. Schwendiman*, 720 P.2d 778 (Utah 1986), an officer found Lopez in his pickup truck parked by a public telephone booth at 3:00 a.m. The truck's motor was not running but there were vehicle tracks in the freshly fallen snow. Lopez was sitting in the driver's seat with his head resting on the steering wheel. When the door to the truck was opened, Lopez fell out of the truck and the officer had to catch him. Lopez smelled of alcohol and was drooling. He needed assistance to stand. The keys were in the ignition. The supreme court affirmed the trial court's finding that Lopez was in actual physical control of the truck. The court reiterated that the statute is intended to protect the public safety by apprehending intoxicated persons before they strike. *Id.* at 781.

In *Richfield City v. Walker*, 790 P.2d 87 (Utah App.1990), Walker, seeking a room, drove to a motel during the early hours of the morning. He was already in an inebriated condition when the hotel informed him that there were no vacancies. He returned to the parking lot and went to sleep in his truck. He was discovered by a police officer who found the truck with the engine off but the headlights on. The keys were in the ignition. Walker was asleep on the seat, his head towards the passenger door and a blanket covering him. Walker submitted to an intoxilyzer test that registered his blood-alcohol level at .21%. This court indicated that whether a person was in actual physical control of a vehicle required consideration of the totality of the circumstances. *Id.* at 93.

[5] *Walker* contains the following list of factors that may be relevant in considering the totality of the circumstances:

(1) whether defendant was asleep or awake when discovered;
(2) the position of the automobile;
(3) whether the automobile's motor was running;
(4) whether defendant was positioned in the driver's seat of the vehicle;
(5) whether defendant was the vehicle's sole occupant;
(6) whether defendant had possession of the ignition key;
(7) defendant's apparent ability to start and move the vehicle;
(8) how the car got to where it was found; and
(9) whether defendant drove it there.

Id. at 93.[1] The court made clear, however, that none of the factors are dispositive of

1. The trial court in the present case expressly considered each of these factors. It made the

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the question as a matter of law, nor is the list all-inclusive. *Id.*

The only case relied upon by defendant as being even arguably advantageous to his position is *State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442 (1971). Bugger was found in his car, which was parked off the traveled portion of the highway. The motor was not running. Bugger was asleep at the time the officer arrived and the officer had some difficulty waking him. The Utah Supreme Court summarily held that "defendant at the time of his arrest was *not* controlling the vehicle, nor was he exercising any dominion over it." *Id.* 483 P.2d at 443. Although not clear from the decision, it appears that Bugger's conviction was reversed because he was asleep when first observed by the officer.[2] In *Lopez*, the supreme court distinguished *Bugger* by emphasizing that there was no evidence that Bugger was positioned in the driver's seat, as was Lopez. *Lopez*, 720 P.2d at 780. In *Walker*, this court indicated that under a totality of the circumstances test, whether a person was asleep when discovered and whether the person was positioned in the driver's seat are relevant factors, but they are not determinative of the question. 790 P.2d at 93. The *Bugger* decision, as subsequently interpreted, does not support defendant's contention that the trial court could not have found him to be in actual physical control simply because he was unconscious when the police officer arrived.

[6, 7] To summarize, we recognize the following established legal guidelines that affect a trial court's factfinding discretion in these cases: the trial court must look to the totality of the circumstances, no single factor being dispositive as a matter of law, *Walker*, 790 P.2d at 93; the statute is intended to prevent intoxicated persons from causing harm by apprehending them before they operate a vehicle, *Garcia*, 645 P.2d at 654; *Lopez*, 720 P.2d at 781; a person need not actually move, or attempt to move, a vehicle, but only needs to have an apparent ability to start and move the vehicle in order to be in actual physical control, *Garcia*, 645 P.2d at 654–55.

The trial court made its findings within these previously established guidelines. Defendant, however, raises several additional factors which he asserts evidence a lack of actual physical control. He claims, in essence, that certain historical facts in this case mandate an ultimate finding that he was not in actual physical control. We must therefore determine whether the trial court violated any previously undeclared legal guidelines when, in light of the facts identified by defendant, it found that defendant was in actual physical control.

[8] Defendant first claims that he left the keys in the ignition when he arrived at the parking lot—while he was not in an intoxicated condition. Defendant's argument totally fails on evidentiary grounds because it is not supported by the record. While the prosecution did stipulate that the keys were in the ignition when the officer arrived, there is no stipulation that defendant placed them there while sober. Even if such evidence were properly introduced, this fact would not preclude the trial court from finding that defendant was in actual

following findings: defendant was the sole occupant of the car and had possession of the ignition key, which was in the ignition; the car was located in the parking lot of a store with direct access to public streets; defendant was sitting upright in the driver's seat, albeit unconscious; the only impairment of defendant's ability to drive the car away was the debilitating effect of the alcohol. In defendant's favor, the trial court found: the car was not running when the police arrived, nor had it been running for some period of time; defendant had only consumed two beers prior to arriving at the store and therefore was likely not legally intoxicated at the time of arrival; defendant did not intend to drive the car away from the store when he arrived. These factual findings have not been challenged.

2. The supreme court's decision in *Bugger* illustrates the problem of not clearly identifying the legal principles that drive the court's decision. We can only speculate as to why the supreme court reversed the trial court's finding in *Bugger*. Without an explanation of how the trial court erred as a matter of law, the *Bugger* decision is not particularly helpful to our analysis and does not serve as a guide to the trial courts and law enforcement and prosecutorial officials of this state. *See Thurman*, 846 P.2d at 1271–1272.

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physical control. Since defendant still had the keys in his possession, it was permissible for the trial court to find that he had the apparent ability to start and move the car.

[9] Defendant next argues that the police officer who found him did not see him touch any of the operating controls. While evidence that a person touched the controls in an attempt to operate the vehicle could be probative, the absence of such evidence does not, as a matter of law, prevent a finding that defendant was in actual physical control. Defendant's argument goes more to the question of whether defendant operated the vehicle, not whether he had actual physical control of the vehicle. Section 41–6–44(1) does not require that a person operate a vehicle in order to be in actual physical control. Having actual physical control over a vehicle while intoxicated is an offense distinct from operating a vehicle while intoxicated. *See Garcia*, 645 P.2d at 653 (statute proscribes conduct beyond and different from driving or operating a moving vehicle and therefore defines two distinct offenses).[3] Defendant's argument is therefore misplaced. Since there is a distinction between operating a vehicle and having actual physical control of a vehicle, a person need not operate, or attempt to operate, a vehicle before he or she may be found to be in actual physical control.

Defendant similarly claims that he could not have been in actual physical control of the vehicle while intoxicated because he was not intoxicated when he arrived at the store. Once again, this argument could have some merit if defendant had been charged with operating a vehicle while intoxicated, but he was only charged with being in actual physical control. The relevant inquiry is whether defendant was in actual physical control after he arrived at the store and consumed seven more beers. Trial courts may certainly consider a person's consumption and intoxication occurring after the person has ceased operation of the vehicle but retained the apparent ability to operate the vehicle.

[10] Defendant also points to the trial court's express finding that defendant intended that his girlfriend drive the car away. The subjective intent of a defendant not to operate the vehicle does not prevent a finding that the defendant was in actual physical control. "[A]n intent to control a vehicle [may] be inferred from the performance of those acts which we have held to constitute actual physical control." *Garcia*, 645 P.2d at 655. Whether or not a person has the subjective intent to subsequently operate a vehicle is irrelevant to the question of whether the person has the present ability to start and move the vehicle. It is therefore permissible for a trial court to find that a person had actual physical control over a vehicle even though the person did not subjectively intend to exercise it.

[11] Finally, defendant claims that his unconscious condition at the time the officer arrived prevents a finding of actual physical control. Defendant's frame of reference, however, is too narrow. The fact that defendant was unconscious at the time the police officer arrived does not prevent a finding that defendant had the ability to start the car and drive away either before or after his unconsciousness. The trial court astutely observed in this case that the only thing that prevented defendant from starting the car and driving away was the incapacitating effect of the alcohol. It was therefore permissible to infer that defendant had actual physical control before the alcohol rendered him unconscious. If a person had actual physical control of a car while drinking himself into an unconscious stupor and would, upon waking, still be in control of the car, a trial court could logically disregard the fact the person was unconscious when the police arrived. We therefore expressly hold that

3. At issue in *Garcia* was Utah Code Ann. § 41–6–44(10) (1953 as amended), which was subsequently repealed and replaced with Utah Code Ann. § 41–6–44(1) (1988), the statute at issue here. Applying the *Garcia* analysis, this court held in *Walker* that section 41–6–44(1) still describes two distinct offenses: (1) operating a vehicle, and (2) being in actual physical control of a vehicle. 790 P.2d at 89 n. 2.

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the fact a person has passed out from imbibing alcohol does not, as a matter of law, prevent a trial court from finding that the person was in actual physical control of a vehicle.[4]

This ruling is consistent with the public policy goal of preventing an intoxicated person from causing harm with a vehicle. An unconscious person, with the ignition keys in possession may, at any time, awake and attempt to exercise his or her control by operating the vehicle. *See Garcia*, 645 P.2d at 653–54 (statute is intended to prevent the danger to the public created when a person gets behind the wheel and has the ability to start the vehicle and drive away) (citing *Hughes v. State*, 535 P.2d 1023 (Ok. Cr.1975) ("an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist.")). The risk to public safety intended to be prevented by the statute therefore continues, albeit in a reduced degree, while a person is unconscious.[5]

While defendant was free to make the foregoing arguments at trial in hopes of convincing the trial court that he did not have actual physical control given the totality of the circumstances, these facts do not mandate a finding by the trial court, as a matter of law, that he did not have actual physical control. Defendant therefore has not shown on appeal how the trial court departed from the proper field of inquiry. Consequently, defendant has not shown how the trial court committed reversible error. Inasmuch as defendant has not made any argument that the trial court's ultimate factual finding was against the clear weight of the evidence, we do not disturb the trial court's determination that defendant was in actual physical control of the vehicle while intoxicated.

4. Were we to hold otherwise, police officers would be required to either wait until the intoxicated person awakes on his or her own volition, or wake the person and allow them to escape prosecution.

CONCLUSION

Defendant has failed to show how the trial court violated any legal guidelines in finding that he was in actual physical control of the car.

We therefore affirm the conviction.

JACKSON, J., concurs.

GARFF, J., concurs in result.

STATE of Utah, Plaintiff and Appellee,

v.

Jeffrey W. ROCHELL, Defendant and Appellant.

No. 920309–CA.

Court of Appeals of Utah.

April 1, 1993.

Defendant was convicted in the Second District Court, Davis County, Douglas Cornaby, J., of possession of a controlled substance, and he appealed. The Court of Appeals, Garff, J., in the lead opinion affirmed the conviction, and, in opinion concurring in result, Bench, J., held that: (1) Court of Appeals can reverse trial court's finding of reasonable suspicion to detain and frisk defendant only if Court of Appeals holds that finding is against clear weight of the evidence, or that trial court violated legal guideline in making finding, and (2) trial court's finding that police officer had reasonable suspicion necessary to detain and frisk defendant was not clearly erroneous.

5. Similar analysis applies when considering defendant's subjective intent that his girlfriend would drive the car away. Even if defendant drove to the store with the original intention that he not drive away, defendant was capable, at any time, of altering his plans and driving the car himself.

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on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale. Federal Land Bank v. Miller, 139 Neb. 161, 296 N.W. 748; Lincoln Nat. Life Ins. Co. v. Curry, 138 Neb. 741, 295 N.W. 282. The record fully sustains the finding of the trial court that the property sold for its fair value under the circumstances and conditions of the sale, and that a subsequent sale would not realize a greater amount.

[5] The mortgage in this case provided that in the event of default the mortgagee should have the right to enter into possession of the property and "collect the rents, issues, and profits thereof." Such a provision is valid and enforceable. Penn Mutual Life Ins. Co v. Katz, 139 Neb. 501, 297 N.W. 899. In the Penn Mutual Life Ins. Co case this court said: "When an assignment of the possession and rents is lawfully executed by the mortgagor and, upon default, demand for its observance is timely made but refused, parties plaintiff or defendant may file application for its adjudication in the foreclosure action still pending and, upon issues joined thereon, the court may retain the same for trial and award that relief to which the parties are entitled."

[6, 7] Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N.W.2d 845. The plaintiff is entitled to an accounting for the rents from the property from the date of the decree of foreclosure to the date of the confirmation of sale.

The judgment confirming the sale of the property to the plaintiff is affirmed. The order overruling the plaintiff's application for assignment of the rents and profits is reversed and cause remanded for further proceedings in accordance with this opinion.

Affirmed in part, and in part reversed.

186 Neb. 134

STATE of Nebraska, Appellee,

v.

Leonard ECKERT, Appellant.

No. 37584.

Supreme Court of Nebraska.

Nov. 20, 1970.

Defendant was convicted before the District Court, Perkins County, Hendrix, J., of unlawfully operating a motor vehicle upon a public highway while under the influence of intoxicating liquor and he appealed. The Supreme Court, Carter, J., held that defendant's conviction before the county court of intoxication did not bar a subsequent prosecution for operating a motor vehicle while under the influence of intoxicating liquor, and that evidence that defendant's motor vehicle was found parked in the right-hand lane of a public highway, that defendant was slumped over the steering wheel in a drunken stupor, and that he was alone in the motor vehicle with no other person in the vicinity sustained conviction of operating a motor vehicle while under the influence of intoxicating liquor even though motor vehicle was not moving and engine was not running at time defendant was arrested.

Affirmed.

1. Criminal Law ⇐200(1)

Conviction for intoxication did not bar subsequent prosecution for operating a motor vehicle while under the influence of

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intoxicating liquor. R.R.S.1943, §§ 39–727, 53–196; Const. art. 1, § 12.

2. Automobiles ⇐332, 355(6)

In a prosecution for operating a motor vehicle while under the influence of intoxicating liquor, the operation of the motor vehicle is an element of the offense and may be established by circumstantial evidence. R.R.S.1943, § 39–727.

3. Automobiles ⇐355(6)

Evidence that defendant's motor vehicle was found parked in right-hand lane of a public highway, that defendant was slumped over steering wheel in a drunken stupor, that he was alone in the motor vehicle and no other person was in proximity to it and that no liquor, nor liquor containers were found in or about the motor vehicle was sufficient to sustain conviction for operating a motor vehicle while under the influence of intoxicating liquor even though the motor vehicle was not moving and the engine was not running at time defendant was arrested. R.R.S.1943, § 39–727.

4. Criminal Law ⇐552(1)

A person charged with crime may be convicted on circumstantial evidence.

Syllabus by the Court

1. The conviction of a defendant upon the charge of intoxication does not bar a subsequent prosecution for the offense of operating a motor vehicle while under the influence of alcoholic liquor.

2. In a prosecution for operating a motor vehicle while under the influence of intoxicating liquor, the operation of the motor vehicle is an element of the offense and may be established by circumstantial evidence.

Frederick E. Wanek, Grant, for appellant.

Clarence A. H. Meyer, Atty. Gen., Ralph H. Gillan, Asst. Atty. Gen., Lincoln, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

CARTER, Justice.

On June 12, 1969, the defendant was charged with a violation of the liquor laws in two counts, first, with intoxication and, second, with unlawfully operating a motor vehicle upon a public highway while under the influence of intoxicating liquor. Defendant was found guilty in county court on both counts. He was assessed a fine of $10 and costs on the charge of intoxication which he paid. On the charge of operating a motor vehicle while under the influence of intoxicating liquor, he was fined $100 and costs and his operator's license suspended for 6 months. From the latter sentence, defendant appealed to the district court and was again found guilty in that court. The identical sentence was imposed as in the county court. From this judgment and sentence, the defendant has appealed to this court.

The primary issue on appeal is the correctness of the trial court's ruling on a plea in bar filed by the defendant in the district court. The plea in bar alleged that defendant had previously been convicted of intoxication and that such charge and conviction thereof is a bar to a further charge of intoxication or of a charge for drunk driving. It is shown that both charges grew out of the same incident. The question is one of law that does not appear to have been previously decided by this court.

It is fundamental under our Constitution that no person shall be compelled in any criminal case to be twice put in jeopardy for the same offense. Art. I, s. 12, Constitution of Nebraska. Cases decided by this court have held that a defendant who has been found not guilty of a higher crime may not be again prosecuted for a

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lesser offense included within the former. The question here, however, is whether or not the offense of intoxication is a lesser offense than operating a motor vehicle on a public highway while under the influence of intoxicating liquor within the meaning of the double jeopardy rule.

In Warren v. State, 79 Neb. 526, 113 N.W. 143, the defendant was first tried and acquitted of murder during an attempt to perpetrate a robbery. Defendant was subsequently charged with robbery of the person formerly alleged to have been murdered growing out of the same incident. A demurrer to the plea in bar was sustained. This court affirmed, holding that double jeopardy was not involved. In the case of In re Resler, 115 Neb. 335, 212 N.W. 765, defendant was acquitted of murder by poisoning. Defendant was subsequently charged under a different statute with poisoning with intent to take life. This court held that the second charge was included in the first and that the acquittal on the first charge was a bar to the prosecution of the second. These two cases appear to point up the differences as to when former jeopardy does or does not apply.

In Stevison v. State (Okl.Cr.App.), 449 P.2d 916, the same situation arose as we have here. In holding public drunkenness and operating a motor vehicle while under the influence of intoxicating liquor to be separate and distinct offenses and that the conviction for one is no bar to a conviction for the other, the court said: "This logically leads us to the consideration of whether Public Drunkenness is a necessary included offense of the offense of Operating a Motor Vehicle While Under the Influence of Intoxicating Liquor, or whether it constitutes an attempt to commit the same. We believe the answer to this proposition can only be in the negative, for the elements necessary to prove the offense of Public Drunkenness are not elements necessary to be proven for the offense of Operating a Motor Vehicle While Under the Influence of Intoxicating Liquor, * * *."

In Reese v. State, 89 Ind.App. 378, 165 N.E. 780, the court said: "We cannot concur in appellant's contention. The offense for which he paid his fine was complete when he appeared in a public place in a state of intoxication; the other offense was not complete until, being in such condition, he drove his automobile on the public highway—an act which from its very nature could but endanger the lives of others traveling upon such highway. These offenses, under our statute, are separate and distinct, and a conviction of one is no bar to a conviction for the other." See, also, Tibbs v. State, 89 Ga.App. 716, 80 S.E.2d 834.

The instant case appears to fall under the rule announced in Warren v. State, *supra*, and not under the rule applied in the case of In re Resler, *supra*. The applicable rule appears more similar to a case where a defendant was first charged and acquitted of murder and subsequently charged with a robbery growing out of the same incident than with a case of an acquittal of murder by poisoning and a subsequent charge of poisoning with intent to take the life of another. In Warren v. State, *supra*, we said: "The essential elements necessary to constitute the crime of murder and those necessary to the crime of robbery are entirely different. In proving the commission of murder, under some circumstances, it may be necessary to show an attempt to rob or an actual robbery, but in proving a robbery it can never be important or necessary to show the murder of the person assaulted. The same proof is not required in both cases, and the crimes are dissimilar, except that in both an assault is an essential element. Tested by every accepted rule, there is no identity between the former charge upon which the defendant was tried and the charge upon which he was convicted. The evidence is clear that he was a participant in the design to rob, even though he was not present in the saloon at the time the money was taken."

It is true, of course, that the intoxication of the defendant is a common element of

the two offenses. But otherwise they are entirely different as are the purposes of the legislation. The primary purpose of section 53–196, R.R.S.1943, is to prohibit intoxication and the evils that such a condition imposes on the public. On the other hand, the primary purpose of section 39–727, R.R.S.1943, is to protect the users of public highways from the dangers of motor vehicles operated by drivers under the influence of intoxicating liquors. "It seems to be settled by the weight of authority, however, that, where the second transaction is for a crime which is but another degree of the crime for which the first prosecution was had, the previous jeopardy will constitute a bar. A man cannot be tried for manslaughter when he has previously been tried for murder of the same person, nor vice versa, for the gist of the charge is the same in both cases, namely, the unlawful killing. The degree of the crime, or, in other words, the gravity of the punishment which may be inflicted, depends upon the circumstances surrounding the transaction, which may aggravate or mitigate the punishment, according to its heinousness or the degree of moral turpitude of the guilty party in its commission. Since in such a case the defendant might have been convicted of manslaughter under the charge of murder in the first degree, the identity of the crime is clear, and, as to such a state of facts there is no conflict in the authorities. Where, however, the same transaction or criminal acts may constitute more than one crime, the question becomes more difficult. If a man breaks into a building and steals from the person of an inmate by force and violence or by putting him in fear, he is guilty of burglary on account of the breaking, of robbery because of the larceny perpetrated by the assault and putting in fear, and of simple larceny on account of the taking and asportation of the goods or money. In such a case a man may be indicted for the burglary, for breaking and entering with intent to steal, or he may be indicted for the robbery, or for the simple larceny. Since these are crimes which differ in their essential elements, the authorities are almost uniform that the former jeopardy of one is no bar to a prosecution for the other (1 Bishop's Criminal Law, § 1062), although a few courts, notably North Carolina and Georgia, hold to the contrary." Warren v. State, *supra*.

[1] Under the authorities cited, we hold that a conviction for intoxication is not a bar to a subsequent prosecution for operating a motor vehicle while under the influence of intoxicating liquor. Admittedly, the question presented is not entirely free from doubt, there being a few cases holding to the contrary. See, State v. Brennan, 13 Utah 2d 195, 371 P.2d 27; State v. McLaughlin, 121 Kan. 693, 249 P. 612.

We think the better reasoning is contained in Warren v. State, *supra*, and the authorities cited to the same effect. The gist of the two offenses is not the same and the purposes of the two statutes are entirely different. The identity of the crimes as separate offenses is clear. Defendant was undoubtedly guilty of intoxication before he entered his car, but he was not guilty of operating a motor vehicle while under the influence of intoxicating liquor until he thereafter entered and operated the motor vehicle. In the one, the purpose is to prohibit the excessive use of alcoholic liquors to the extent of intoxication. In the other, the purpose is to prohibit the driving of motor vehicles on the public highways in a manner dangerous to the public, a danger resulting from the notorious driving conduct of intoxicated operators.

[2–4] The defendant further contends that the evidence will not sustain a finding that he was operating a motor vehicle on a public highway at the time charged. In this respect the evidence shows that defendant's motor vehicle was found parked in the right-hand lane of a public highway approximately 8 miles north of Grant, Nebraska. Defendant was slumped over the steering wheel in a drunken stupor. He

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was alone in the motor vehicle and no other person was in proximity to the motor vehicle. No liquor, nor liquor containers, were found in or about the motor vehicle. The motor vehicle was not moving and the engine was not running. Defendant stated that he had no recollection of what happened from the time he left Madrid until he was aroused by law enforcement officers at the time of his arrest. These facts are not disputed. The evidence is sufficient, although circumstantial, to sustain the finding that defendant operated his motor vehicle on a public highway while under the influence of intoxicating liquor. A person charged with crime may be convicted on circumstantial evidence. State v. Ohler, 178 Neb. 596, 134 N.W.2d 265.

We find the record to be free from prejudicial error and the judgment of the district court is affirmed.

Affirmed.

186 Neb. 119

Wayne LUTHER, Appellant,

v.

Kenneth SOHL, Appellee.

No. 37561.

Supreme Court of Nebraska.

Nov. 20, 1970.

Plaintiff brought action for personal injuries sustained while assisting defendant in repairing a roof on defendant's farm. The District Court, Dodge County, Flory, J., sustained defendant's motion to dismiss and the plaintiff appealed. The Supreme Court, McCown, J., held that where, after negotiations between plaintiff and defendant's insurer ceased, five months elapsed before statute of limitations expired, statement of insurer's agent that plaintiff need not worry about the statute of limitations so long as they were still negotiating did not estop defendant from raising statute of limitations as a defense to plaintiff's action.

Affirmed.

1. Limitation of Actions ⇐13

In a proper case, estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations.

2. Limitation of Actions ⇐13

A defendant may, by his representations, promises or conduct, be estopped from raising statute of limitations where other elements of estoppel are present.

3. Estoppel ⇐52

Equitable estoppels cannot be subjected to fixed and settled rules of universal application but rest largely on facts and circumstances of each particular case.

4. Limitation of Actions ⇐13

Where a plaintiff has ample time to institute his action after inducement for delay has ceased its operation, he cannot excuse his failure to act within statutory time on ground of estoppel.

5. Limitation of Actions ⇐13

Where, after negotiations between plaintiff and defendant's insurer ceased, five months elapsed before statute of limitations expired, statement of insurer's agent that defendant need not worry about statute of limitations so long as they were still negotiating did not estop defendant from raising statute of limitations as a defense to plaintiff's action for personal injuries.

Syllabus by the Court

1. In a proper case, estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations. A defendant may, by his representations,

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purpose is valid, are any means, no matter how onerous, justifiable?

If the exclusion is invalid, is it necessary to apply the Sunburst principle? See *Kitto v. Minot Park District*, 224 N.W.2d 795 (N.D.1974). If Benson is entitled to benefits under the Act, from what source would the compensation be paid?

These and other relevant questions must be fully litigated in the adversary setting of the declaratory judgment action before a determination of the constitutionality of the agricultural service exclusion can be made. We do not mean to suggest by this opinion that the North Dakota Legislature should await the outcome of this case or delay any contemplated action in this essentially legislative area, should it wish to consider enactments relating to the agricultural service exclusion from the Workmen's Compensation Act. According to 1A Larson, Workmen's Compensation Law, § 53:10 (1973), at least seventeen states have eliminated the agricultural exclusion.

For the foregoing reasons, the case is remanded to the district court with instructions to treat it as a declaratory judgment action with concomitant notice requirements to all interested persons.

ERICKSTAD, C. J., and PAULSON, SAND and VOGEL, JJ., concur.

STATE of North Dakota, Plaintiff and Appellee,

v.

Gerald A. GHYLIN, Defendant and Appellant.

Crim. No. 568.

Supreme Court of North Dakota.

Jan. 27, 1977.

Defendant was convicted before the County Court with Increased Jurisdiction, Burleigh County, Gerald G. Glaser, J., of being in actual physical control of vehicle upon highway while under influence of intoxicating liquor, and he appealed. The Supreme Court, Pederson, J., held that evidence was sufficient to sustain conviction of defendant, who was allegedly seen by deputy sheriff getting out of driver's side of vehicle in ditch and who allegedly admitted on two separate occasions that he was driving.

Affirmed.

1. Automobiles ⇐355(6)

Evidence was sufficient to support conviction of defendant, who was allegedly seen by deputy sheriff getting out of driver's side of vehicle in ditch and who allegedly admitted on two separate occasions that he was driving, of being in "actual physical control" of vehicle "upon highway", while under influence of intoxicating liquor. NDCC 39–08–01.

2. Automobiles ⇐332

Purpose of statute outlawing being in "actual physical control" of vehicle upon highway while under influence of intoxicating liquor is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers. NDCC 39–08–01.

3. Automobiles ⇐332

One who has been drinking intoxicating liquors should not be encouraged to test his driving ability on highway, even for short distance, where his life and lives of others hang in balance. NDCC 39–08–01.

4. Statutes ⇐188

Rule of statutory construction is that words will be given their plain, ordinary, and commonly understood meaning.

5. Automobiles ⇐332

As used in statute outlawing actual physical control of vehicle upon highway while under influence of intoxicating liquor, term "highway" means more than paved or

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improved portion used for travel and includes shoulder and ditch alongside roadway. NDCC 39–01–01, subds. 21, 50, 52, 39–08–01.

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus by the Court

1. The purpose of Section 39–08–01, North Dakota Century Code, is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers.

2. One who has been drinking intoxicating liquor should not be encouraged to test his driving ability on the highway, even for a short distance, where his life and the lives of others hang in the balance.

3. As used in Section 39–08–01, NDCC, the term "highway" means more than the paved or improved portion used for travel and includes the shoulder and ditch alongside the roadway.

Daniel J. Chapman, Bismarck, for defendant and appellant.

John M. Olson, State's Atty., and Rolf P. Sletten, Asst. State's Atty., Bismarck, for plaintiff and appellee; argued by Rolf Sletten.

PEDERSON, Justice.

This is an appeal by the defendant, Gerald A. Ghylin, from his conviction by the Burleigh County Court With Increased Jurisdiction of the crime of being in "actual physical control" of a vehicle upon a highway while under the influence of intoxicating liquor, in violation of § 39–08–01, NDCC. In this proceeding, Ghylin contends that (1) he was not in "actual physical control" of the vehicle, and (2) he was not "upon a highway" at the time of his arrest. We affirm.

Ghylin was arrested by Burleigh County Deputy Sheriff Paul Genter about midnight on April 17, 1976, after Genter had stopped his patrol car two or three miles west of Wing, North Dakota, to investigate a vehicle in the ditch, apparently signalling for help with its headlights. Genter testified that as he approached Ghylin was just getting out of the driver's side of the vehicle and, in doing so, he made a motion as if he were taking the keys out of the ignition. The deputy sheriff observed that Ghylin had the keys in his hand as he alighted from the vehicle.

According to Genter's testimony, Ghylin told him that he had driven into the ditch and gotten stuck. After detecting the odor of alcohol, Genter asked Ghylin to perform some balancing and coordination tests, such as finger-to-nose and walking a straight line. Ghylin's poor performance of these tests indicated to Officer Genter that Ghylin was intoxicated; he placed him under arrest, informed him of his *Miranda* rights, and transported him to the Burleigh County sheriff's office.

Deputy Sheriff Genter also testified that during the ride to Bismarck, Ghylin again indicated that he had been driving the vehicle. At the Burleigh County sheriff's office, Ghylin was given a Breathalyzer test, which subsequently indicated a blood alcohol content of .14%.

Ghylin's version of the incidents of the evening differs markedly from Deputy Sheriff Genter's testimony, and is substantially as follows:

Ghylin left Wing in the company of a hitchhiker he had picked up earlier in the evening. The hitchhiker was actually driving the vehicle with Ghylin's permission when it left the road and went into the ditch a few miles west of Wing. When the deputy sheriff arrived on the scene, the hitchhiker, afraid of being arrested, hid on the floorboard of the vehicle and remained undetected. Ghylin did not tell Officer Genter that he had been driving that evening, as Genter, on two occasions, testified that he had, nor did he disclose to anyone that someone else was driving, apparently in an effort to protect the hitchhiker.

Ghylin also disputes the deputy sheriff's testimony that he removed the key from the ignition, or that he was given any balancing or coordination tests prior to his

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arrival at the Burleigh County sheriff's office.

In support of Ghylin's testimony, defense witness Albert Rosenau testified that at about midnight on the evening in question he observed the Ghylin vehicle and recognized Ghylin as a passenger in that vehicle, although he was unable to identify the driver. One additional conflict in the evidence involves a rear tire of Ghylin's vehicle which, from an examination of a picture introduced as an exhibit by Ghylin at trial, appears to be completely off the rim of the vehicle. Deputy Sheriff Genter testified that all of the tires were on the vehicle when he arrested Ghylin that evening.

[1] The statute under which Ghylin was convicted, § 39-08-01, NDCC, states in part:

"1. No person shall drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if:

"a. * * *

"b. He is under the influence of intoxicating liquor;"

Ghylin first contends that the evidence was insufficient to support the conclusion that he was in actual physical control of his vehicle. We believe that, in view of the foregoing conflicting evidence concerning the events of the evening, sufficient evidence existed to support Ghylin's conviction of being in actual physical control of a vehicle while intoxicated. As we said in *State v. Allen*, 237 N.W.2d 154, 161 (N.D. 1975):

"We have noted the different perspectives of the trial court and the appellate court as to circumstantial evidence:

'In *State v. Miller*, 202 N.W.2d 673 (N.D.1972); *State v. Champagne*, 198 N.W.2d 218 (N.D.1972), and *State v. Carroll*, 123 N.W.2d 659 (N.D.1963), we pointed out that the rule as to circumstantial evidence, at the trial level, is that such evidence must be conclusive and must exclude every reasonable hypothesis of innocence, but at the appellate level we do not substitute our judgment for that of the jury or trial court where the evidence is conflicting, if one of the conflicting inferences reasonably tends to prove guilt and fairly warrants a conviction.' *State v. Kaloustian*, 212 N.W.2d 843, 845 (N.D. 1973); *accord, State v. Fuchs*, 219 N.W.2d 842, 846 (N.D.1974); *State v. Neset*, 216 N.W.2d 285, 287 (N.D.1974); and *State v. Steele*, 211 N.W.2d 855, 870 (N.D.1973)."

The admission of the defendant on two separate occasions that he was driving, along with the other evidence, is sufficient to support the trial court's conclusion that he was in actual physical control of the vehicle. Ghylin attempts to distinguish the instant case from the situation in *State v. Schuler*, 243 N.W.2d 367 (N.D.1976), in which we affirmed a conviction of being in actual physical control of a vehicle when the defendant was shown to have been behind the steering wheel of the vehicle, the ignition was turned to the "on" position, and the transmission was engaged. He contends that in the instant case the ignition was off and the transmission was not engaged.

The definition of "actual physical control" does not rest on such fine distinctions. The court, in *Commonwealth v. Kloch*, 230 Pa.Super. 563, 327 A.2d 375, 383 (1975), defined the phrase in these terms:

"A driver has 'actual physical control' of his car when he has real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, its movements of machinery. * * *

"It is not dispositive that appellant's car was not moving, and that appellant was not making an effort to move it, when the troopers arrived. A driver may be in 'actual physical control' of his car and therefore 'operating' it while it is parked or merely standing still 'so long as [the driver is] keeping the car in restraint or in position to regulate its movements. Preventing a car from moving is as much control and dominion as actually putting the car in motion on the highway. Could one exercise any more regulation over a

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thing, while bodily present, than prevention of movement or curbing movement.' *State v. Ruona, supra* [133 Mont. 243] at 248, 321 P.2d [615] at 618." [Punctuation as in original.]

In *State v. Schuler, supra*, we noted that the Oklahoma court in *Hughes v. State*, Okl.Cr., 535 P.2d 1023, 1024 (1975), sustained a conviction for being in actual physical control where the defendant was found slumped behind the steering wheel, with the key in the ignition. In that case, the Oklahoma court said:

"We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had 'actual physical control' of the vehicle within the meaning of the statute."

Ghylin argues that to sustain convictions of being in actual physical control of a vehicle while intoxicated in cases where the defendant has voluntarily stopped his vehicle off the road after realizing his inability to drive safely is to discourage such behavior in the future. He argues that convictions under these circumstances will encourage drivers aware of their impaired driving capability to continue driving rather than risk conviction for being in actual physical control should they pull off the highway to await other transportation.

[2, 3] While we believe such behavior should be encouraged, the real purpose of the statute is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers. As stated in *State v. Schuler, supra*, the "actual physical control" offense is a preventive measure intended to deter the drunken driver. One who has been drinking intoxicating liquor should not be encouraged to test his driving ability on the highway, even for a short distance, where his life and the lives of others hang in the balance.

In *City of Cincinnati v. Kelley*, 47 Ohio St.2d 94, 351 N.E.2d 85 (1976), the Ohio court sustained a conviction of being in actual physical control where the defendant was found in his vehicle at the side of the road. After realizing he was in no condition to drive, the defendant had left the vehicle to telephone his wife to pick him up. When the police arrived, they found him back in his car, with the key in the ignition, supposedly awaiting his wife's arrival. Finding the defendant to have been in actual physical control, the court said:

"Therefore, the term 'actual physical control,' as employed in the subject ordinance, requires that a person be in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that he is physically capable of starting the engine and causing the vehicle to move." 351 N.E.2d at 87, 88.

Even if we could envision a set of circumstances in which a defendant, by his conduct, finding himself upon a highway in an impaired condition, acted reasonably to safeguard his life and the lives of others, this is certainly not such a case. At trial, Ghylin testified that he was attempting to get his vehicle out of the ditch, and that the vehicle almost broke free when Deputy Sheriff Genter arrived. Such conduct does not represent a realization of impaired driving ability, a sincere effort to remain off the highway, or a concern for the safety of others.

Ghylin next contends that he was not "upon a highway" when apprehended, as required by the statute. Section 39–01–01, NDCC, contains the statutory definition of these relevant terms:

"21. 'Highway' shall mean the entire width between the boundary lines of every way publicly maintained when any part thereof is open to

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the use of the public for purposes of vehicular travel;

* * * * * *

"50. 'Right of way' shall mean the privilege of the immediate use of a roadway;

* * * * * *

"52. 'Roadway' shall mean that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways the term 'roadway' as used herein shall refer to any such roadway separately but not to all such roadways collectively;"

Ghylin's argument that the ditch along the roadway is not part of the "highway" rests upon this tenuous logic: "Highway" in subsection 21 above is defined as the entire width of every way publicly maintained. "Way" refers to "right of way," defined in subsection 50 above as use of a "roadway," which is further defined in subsection 52 above as "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder."

Thusly, Ghylin arrives at his definition of "highway." Such a narrow definition of "highway" has been foreclosed, however, by our decision in *State v. Fuchs*, 219 N.W.2d 842 (N.D.1974), where in sustaining a conviction of driving while intoxicated, we held that the shoulder is considered to be part of the highway.

[4, 5] Moreover, the subsections set out above clearly encompass a broader definition of "highway" than Ghylin suggests. A rule of statutory construction is that words will be given their plain, ordinary, and commonly understood meaning. *Tormaschy v. Hjelle*, 210 N.W.2d 100 (N.D.1973). Subsection 21 of Section 39-01-01 defines "highway" as "the entire width * * * when any part thereof is open to the use of the public for purposes of vehicular travel." The clear inference is that "highway" means more than the paved or improved portion used for travel. This analysis is supported by the definition of "Roadway" in subsection 52. That term, which Ghylin proposes as a synonym for "highway," is defined, in part, as "that portion of a highway," thus clearly indicating that "highway" includes an area larger than that portion improved and used exclusively for vehicular travel. In this instance, we believe the statutory definition of "highway" includes the ditch alongside the roadway.

We believe the evidence was sufficient to sustain the conviction of being in actual physical control of a vehicle upon a highway while under the influence of intoxicating liquor.

The judgment is affirmed.

ERICKSTAD, C. J., and PAULSON, SAND and VOGEL, JJ., concur.

In the Interest [CUSTODY] OF J. O., a child.

D. A. O., Plaintiff and Appellee,

v.

V. A. O., Defendant and Appellant.

Civ. No. 9305.

Supreme Court of North Dakota.

Jan. 27, 1977.

Application was made for stay of order of the District Court of Sargent County, Robert L. Eckert, J., which granted temporary custody of minor child to its paternal grandparents. The Supreme Court, Erickstad, C. J., held that where child had been in custody of its grandparents for several weeks, trial court was satisfied they could care for child, and little had been shown to allay misgivings about stability of living

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a placement which does not fully take into account the alternatives specifically envisioned by statute.

AMUNDSON, Justice (concurring specially).

There is no question that this juvenile stated on the record his desire to be represented by an attorney, and he has a right to same.

The record is also clear that juvenile and his father were aware of this right to counsel well in advance of the date set for hearing, since father had contacted three lawyers who apparently did not undertake representation. This record does not reflect one contact by the father or juvenile with the court advising the court of the difficulty being encountered in employing legal representation. The trial court was not advised of this fact until the classic "midnight hour" or at the start of the long scheduled hearing.

Under these circumstances, it is easily understood why the trial court was less than enthused with the request of juvenile and his father for a continuance at this late hour. This is probably the only type of case where a party would get a continuance based on such conduct, since the granting of a continuance is totally at the discretion of the trial court.

I agree with the majority's position that the minor is entitled to legal representation, but do not agree or condone the manner in which the father handled the issue of an attorney being obtained or appointed. Parents should not be allowed to procrastinate on this aspect of the proceeding up to the time set for the hearing. This type of conduct can easily be described as an attempt to avoid the inevitable.

STATE of South Dakota, Plaintiff and Appellee,

v.

Thomas B. KITCHENS, Defendant and Appellant.

No. 17849.

Supreme Court of South Dakota.

Considered on Briefs on Oct. 8, 1992.

Decided April 14, 1993.

Defendant was convicted in the Circuit Court of the Sixth Judicial Circuit, Hughes County, James W. Anderson, J., of driving under the influence of alcohol, and he appealed. The Supreme Court held that: (1) defendant was in actual physical control of his vehicle while under the influence of alcohol, and (2) specific intent to drive was not an element of actual physical control.

Affirmed.

1. Automobiles ⇐332

Notwithstanding that his keys were not in the ignition, defendant found sleeping behind the steering wheel of his parked vehicle, close to a city street, and with the keys within quick and easy reach in one of his pockets, was in "actual physical control" of his vehicle, as required to support conviction for driving under the influence of alcohol. SDCL 32-23-1.

See publication Words and Phrases for other judicial constructions and definitions.

2. Automobiles ⇐332

Specific intent to drive is not an element of actual physical control of vehicle, required for conviction of driving under influence of alcohol. SDCL 32-23-1.

3. Automobiles ⇐332

All that is necessary to establish actual physical control of vehicle, as required to support conviction of driving under influence of alcohol, is showing that vehicle was operable and that defendant was in position to manipulate controls which would cause it to move. SDCL 32-23-1.

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Mark Barnett, Atty. Gen., Frank Geaghan, Asst. Atty. Gen., Pierre, for plaintiff and appellee.

Timothy M. Engel of May, Adam, Gerdes & Thompson Pierre, for defendant and appellant.

PER CURIAM.

Thomas B. Kitchens (Kitchens) appeals his conviction for driving while under the influence of an alcoholic beverage (DUI). We affirm.

FACTS

At approximately 10:20 p.m. on the night of September 20, 1991, a police officer for the City of Pierre, South Dakota, was dispatched to a local convenience store in order to investigate a person who had passed out in a pickup truck parked in the store's parking lot. When the officer arrived, he found the pickup in the parking lot as reported, parked approximately ten to fifteen feet south of a city street. Kitchens was "slumped over" the steering wheel of the pickup. His feet were on the floorboard on the driver's side of the vehicle. The pickup was not running and the keys were not in the ignition. There were no other persons in or around the pickup and there were "several" empty beer cans inside the vehicle.

The police officer woke Kitchens who took his hands off the steering wheel and, at the officer's request, got out of the pickup. Kitchens was unable to locate a driver's license, registration or proof of insurance and asked the officer if he was trying to arrest him for DUI. Kitchens told the officer he could not be arrested for DUI since his vehicle was not moving. The officer asked Kitchens to perform several field sobriety tests and, as a result of those tests, the officer formed the opinion that Kitchens was under the influence of an alcoholic beverage.

During the course of his investigation and prior to placing Kitchens under arrest, the police officer discovered the ignition key for the pickup in one of Kitchens' pants pockets. At approximately 10:43 p.m., the officer placed Kitchens under arrest for driving while under the influence of an alcoholic beverage. The officer read Kitchens the implied consent warnings and Kitchens agreed to take a blood test. The blood sample later revealed a percentage by weight of alcohol of 0.242 percent.

On November 13, 1991, State filed an information charging Kitchens with one count of driving or actual physical control of a vehicle while under the influence of alcohol (SDCL 32-23-1(2)) and an alternative count of driving or actual physical control of a vehicle while having 0.10 percent or more by weight of alcohol in his blood (SDCL 32-23-1(1)). Kitchens and State subsequently entered into a stipulation of facts and a trial to the court took place on December 17, 1991. The trial was confined to legal argument over the issue of whether Kitchens' conduct fell within the elements of the offense of actual physical control of a vehicle while under the influence of alcohol. On February 3, 1992, the trial court entered findings of fact and conclusions of law determining that Kitchens was guilty beyond a reasonable doubt of driving or being in actual physical control of a vehicle while under the influence of alcohol or while having 0.10 percent or more by weight of alcohol in his blood (SDCL 32-23-1). An amended judgment of conviction was entered on March 23, 1992, providing in pertinent part, "[i]t is therefore, the JUDGMENT of this Court that [Kitchens] is guilty of Driving While Under the Influence of an Alcoholic Beverage, in violation of SDCL 32-23-1(2) or (1)." Kitchens appeals.

ISSUE

DID KITCHENS' PRESENCE IN HIS VEHICLE AT THE TIME OF HIS ARREST CONSTITUTE ACTUAL PHYSICAL CONTROL OF THE VEHICLE AS CONTEMPLATED BY SDCL 32-23-1?

SDCL 32-23-1(1) and (2) provide:

A person may not drive or be in actual physical control of any vehicle while:

(1) There is 0.10 percent or more by weight of alcohol in his blood as shown

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by chemical analysis of his breath, blood or other bodily substance;

(2) Under the influence of an alcoholic beverage[.]

These provisions prohibit the acts of driving or being in actual physical control of a vehicle while under the influence of an alcoholic beverage or while having 0.10 percent or more by weight of alcohol in the blood. Kitchens contends he was not in "actual physical control" of his vehicle on the night of his arrest because the keys to the pickup were not in the ignition and because there was no showing that he actually intended to operate the vehicle.

In *State v. Hall*, 353 N.W.2d 37, 41–42 n. 2 (S.D.1984), we approved a jury instruction defining "actual physical control" of a vehicle under SDCL 32–23–1 as follows:

> A person is in "actual physical control" of a vehicle within the meaning of these instructions when the vehicle is operable and he is in a position to manipulate one or more of the controls of the vehicle that cause it to move or affects its movement in some manner or direction. It means existing or present bodily restraint, directing influence, domination or regulation of the vehicle. It means such control as would enable the defendant to actually operate his vehicle in the usual and ordinary manner. "Actual physical control" of a vehicle results, even though the [vehicle] merely stands motionless, so long as a person keeps the vehicle in restraint or is in a position to regulate its movements.

Kitchens is correct in his assertion that this court has never determined whether "actual physical control" of a vehicle requires that the keys be in the ignition. *See, Hall, supra* (key was in the ignition). *See also, State v. Remacle*, 386 N.W.2d 38 (S.D.1986) (keys in the ignition); *Petersen v. Dept. of Public Safety*, 373 N.W.2d 38 (S.D.1985) (keys in the ignition); *State v. DuBray*, 298 N.W.2d 811 (S.D.1980) (motor running); *Kirby v. State Dept. of Public Safety*, 262 N.W.2d 49 (S.D.1978) (motor running).

Although we have not yet determined whether the keys must be in the ignition for a defendant to have actual physical control of a vehicle, several jurisdictions have addressed this question. In *State v. Peterson*, 236 Mont. 247, 769 P.2d 1221 (1989), the defendant was found in the driver's seat, slumped over to the right, with his feet in the area of the pedals. The vehicle was not running but the defendant himself later testified he had the keys in his pocket. As to the defendant's claim he was not in a position to exert "actual physical control" over the vehicle, the Montana Supreme Court held that, "[h]ere Peterson was found in the driver's seat of a vehicle which had run off the road, with the keys to the vehicle in his pocket. In such a position he could regulate the movements of the vehicle." *Peterson*, 769 P.2d at 1223.

More closely on point is the decision of the North Dakota Supreme Court in *City of Fargo v. Theusch*, 462 N.W.2d 162 (N.D. 1990). In *City of Fargo*, the defendant was found sleeping on the right side of the bench seat of his pickup truck which was parked in a restaurant parking lot. The ignition key was found in his right front coat pocket. The defendant was convicted of being in actual physical control of the vehicle while under the influence of alcohol. He argued on appeal that a person asleep in a vehicle with the ignition keys in his coat pocket cannot be convicted of being in actual physical control of a vehicle. The North Dakota Court held:

> Actual physical control of a vehicle does not solely depend on the location of the ignition key. The location of the key is one factor among others to consider. Here the defendant was found sleeping in his vehicle which was parked in a restaurant parking lot, the keys were within easy reach, and the officer saw indicia of intoxication when he awakened the defendant. "An intoxicated individual who gets into his vehicle to sleep poses a threat of immediate operation of the vehicle at any time while still intoxicated." The purpose of the "actual physical control" offense is a preventive measure. We have long construed the actual physical control statute to broadly prohibit

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any exercise of dominion or control over a vehicle by an intoxicated person. In [*State v. Schuler*, 243 N.W.2d 367 (N.D. 1976)] we upheld a conviction of a defendant who was seated behind the wheel of her vehicle, which was partially in the ditch and "high-centered", apparently unable to move. A vehicle which is temporarily high-centered does not eliminate the possibility that it may soon be extricated and the driver may again set out on an inebriated journey. This same rationale is applicable here because the defendant could possibly wake up, find the keys in his pocket and set out on an inebriated journey at any moment.

We conclude that the trial court did not error in finding that [defendant] was in actual physical control of his vehicle.

City of Fargo, 462 N.W.2d at 163–64 (citations omitted).

The foundations of South Dakota law on the "actual physical control" prohibition are nearly identical to those pronounced by the North Dakota Supreme Court in *City of Fargo, supra*. In *Kirby*, 262 N.W.2d at 51–52, we quoted *Hughes v. State*, 535 P.2d 1023, 1024 (Okla.Crim.App.1975), for the proposition that:

"It is our opinion that the legislature, in making it a crime to be in 'actual physical control of a motor vehicle while under the influence of intoxicating liquor,' intended to enable the drunken driver to be apprehended before he strikes . . .

* * * * * *

We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had 'actual physical control' of the vehicle within the meaning of the statute. We, therefore, find there was sufficient competent evidence to [illegible] the verdict."

Accord, Remacle, supra.

[1] Here, just as in *City of Fargo, supra*, Kitchens was found sleeping behind the steering wheel of his vehicle which was parked in a convenience store's parking lot, close to a city street. The keys were within quick and easy reach in one of his pockets. No one else could have had control of the vehicle unless Kitchens first relinquished his. The officer saw indicia of intoxication when he administered the field sobriety tests. At any time, Kitchens might have awakened, found the keys in his pocket and set out on an inebriated journey. Based upon South Dakota's own settled law in *Kirby*, and application of similar policy principles in *City of Fargo, supra*, we hold that the trial court did not err in finding that Kitchens was in actual physical control of his vehicle regardless of the fact that the keys were not in the ignition.

Kitchens also argues that the elements of "actual physical control" include the additional element of a specific intent to drive the vehicle. He submits that proof of this element was lacking in this case and, therefore, the trial court erred in adjudicating him guilty of the actual physical control offense.

[2] We must heed our own statute. SDCL 32–23–1 simply provides that, "[a] person may not drive or be in *actual physical control* of any vehicle while" having 0.10 percent or more by weight of alcohol in his blood or while under the influence of an alcoholic beverage. (emphasis added). The statute says nothing about actual physical control *with the intention to drive* the vehicle. Thus, there is no statutory support for Kitchens' argument that specific intent to drive is an element of actual physical control of a vehicle. *See, State v. Grotzky*, 222 Neb. 39, 382 N.W.2d 20 (1986) (an element of criminal intent is not a part of the proof under statute prohibiting operating or actual physical control of vehicle while under influence of alcohol where statutory language did not include intent element).

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[3] Moreover, the elements of actual physical control we defined in *Hall, supra*, also fail to contain any reference to a specific intent to drive the vehicle. In fact, our analysis of the purpose of the actual physical control offense in *Kirby, supra*, leads to a contrary conclusion. In *Kirby*, we observed that "[t]he defendant when arrested may have been exercising *no conscious violation with regard to the vehicle*, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away." *Kirby*, 262 N.W.2d at 51–2 (quoting *Hughes*, 535 P.2d at 1024). In this case, Kitchens had the keys in his pocket. Under our settled law, all that is necessary to establish actual physical control of a vehicle is a showing that the vehicle was operable and that the defendant was in a position to manipulate the controls which would cause it to move.

Based upon the above analysis, we do not find the specific intent to drive to be an element of the offense of actual physical control of a vehicle while under the influence of alcohol. Having reached this conclusion, however, we share the concerns expressed by the Appellate Court of Illinois in *People v. Cummings*, 176 Ill.App.3d 293, 125 Ill.Dec. 514, 530 N.E.2d 672 (1988). In *Cummings*, the Illinois court followed a previous holding that, "in an Illinois driving under the influence prosecution, the State is not required to prove the defendant's intent to put the vehicle into motion ... so a sleeping defendant's intent is irrelevant in determining whether the State met its burden of proof." *Cummings*, 125 Ill. Dec. at 517, 530 N.E.2d at 675. Nevertheless, the court went on to state:

> We are concerned, however, that through time and expansion by subsequent court rulings, [*People v. Guynn*, 33 Ill.App.3d 736, 338 N.E.2d 239 (Ill.App.Ct.1975)] may have become counter-productive to society's goal of providing safe highways....
>
> We can expect that most people realize, as they leave a tavern or party intoxicated, that they face serious sanctions if they drive. While the preferred response would be for such people either to find alternate means of getting home or to remain at the tavern or party without getting behind the wheel until sober, this is not always done. And while we can say that such people should have stayed sober or planned better, that does not realistically resolve this all-too-frequent predicament.
>
> For the intoxicated person caught between using his vehicle for shelter until he is sober or using it to drive home, *Guynn* encourages him to attempt to quickly drive home, rather than to sleep it off in the car, where he will be a beacon to police.
>
> We believe it would be preferable, and in line with legislative intent and social policy, to read more flexibility into *Guynn*. In those rare instances where the facts show that a defendant was furthering the goal of safer highways by voluntarily "sleeping it off" in his vehicle, *and that he had no intent of moving the vehicle*, trial courts should be allowed to find that the defendant was not "in actual physical control" of the vehicle for purposes of section 11–501.

Cummings, 125 Ill.Dec. at 517, 530 N.E.2d at 675 (emphasis added).

The soundness of this view is well represented in State, *City of Falcon Heights v. Pazderski*, 352 N.W.2d 85 (Minn.Ct.App. 1984). The defendant had quarreled with his girl friend with whom he lived. He then drove to two nearby taverns where he became intoxicated. He returned home and parked in a parking area adjacent to the garage in a place where he would normally park for the night. He entered the house but after deciding he did not wish to confront his girl friend, the defendant returned to his car and stretched out on the front seat where he fell asleep. Police officers later found the defendant sleeping on the front seat, sitting on the driver's side with his head over toward the passenger side. The car was not running and the keys were not in the ignition. There was no evidence the car had been driven recently. There was no record evidence the defendant had any intention other than sleep-

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ing the rest of the night in the car. The defendant later testified he had previous experience sleeping nights in his car during hunting trips. The defendant was convicted for being in physical control of a motor vehicle while under the influence of alcohol. In reversing his conviction, the Minnesota Court of appeals reasoned:

> [T]he facts in this case do not support the conclusion that appellant exercised the necessary physical control. Conviction in this case would serve no purpose related to the statute because appellant had arrived home, had slept for about three hours, and had no intention of restarting the vehicle and/or driving any place else. "[T]he 'actual physical control' offense is a preventive measure intended to deter the drunken driver. One who has been drinking intoxicating liquor should not be encouraged to test his driving ability on the highway, even for a short distance, where his life and the lives of others hang in the balance." [*State Dept. of Public Safety v.*] *Juncewski*, 308 N.W.2d [316] at 320, [Minn. 1981], quoting *State v. Ghylin*, 250 N.W.2d 252, 255 (N.D.1977).
>
> *Schuler* and *Juncewski* are relevant to those fact situations where a drinking driver is found somewhere on a highway road or private property in a setting giving support to a fair inference that the driver was short of his intended destination and, if left alone, might restart the vehicle in an intoxicated state and continue on. Appellant here had parked his car at his own home for the evening, left his motor vehicle, entered his own home and later returned to his car, not with any intention of using or operating it as a motor vehicle but merely using it as a place to get some sleep.

Pazderski, 352 N.W.2d at 88.

In contrast with *Pazderski*, the present case is not one of those rare instances where the facts show that the defendant was voluntarily sleeping off the effects of alcohol with no intention of moving the vehicle. Kitchens' vehicle was parked in a convenience store parking lot in close proximity to a city street. Obviously, Kitchens was far short of his intended destination as there is no indication in the record [illegible] resided at the convenience store. [illegible] had passed out in the driver's seat with [illegible] hands still on the steering wheel and [illegible] his feet on the floorboard of the driver's side in proximity to the pedals. There were several twelve ounce cans of Budweiser Beer inside the vehicle. Kitchens could not produce a driver's license or proof of insurance. No one else was in the vehicle or near it. Although the vehicle was not running and the keys were not in the ignition, they were within quick and easy reach in Kitchens' pants pocket. At any point, Kitchens might have awakened, pulled the keys out of his pocket, started the vehicle and proceeded on to the nearby street in an inebriated condition, thereby posing a threat to the public. This is the precise risk the actual physical control statute is intended to avoid. *Kirby, supra*. For that reason, we find no error in the trial court's finding that Kitchens was in actual physical control of his vehicle while under the influence of alcohol.

Affirmed.

MILLER, C.J., and HENDERSON, WUEST, SABERS and AMUNDSON, JJ., participating.

Terry AESOPH and Steve Aesoph, Plaintiffs and Appellants,

v.

Richard KUSSER, d/b/a Kusser Insurance Agency and North Central Crop Insurance, Inc., Defendants and Appellees.

No. 17960.

Supreme Court of South Dakota.

Submitted on Briefs on Feb. 10, 1993.

Decided April 14, 1993.

Farmers brought suit against insurance agent for negligently misrepresenting

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been discovered through prior inspections and through complaints received, and the facility refuses to allow the state to conduct an inspection under the circumstances presented here.

In view of the foregoing reasons, the judgment of the Court of Appeals is reversed and that of the trial court reinstated. Costs are adjudged against Clay County Manor.

REID, C.J., and O'BRIEN, DAUGHTREY and ANDERSON, JJ., concur.

STATE of Tennessee, Plaintiff-Appellee,

v.

David LAWRENCE, Defendant-Appellant.

Supreme Court of Tennessee, at Knoxville.

March 1, 1993.

Defendant was convicted in the Criminal Court, Johnson County, Arden L. Hill, J., of driving while under influence of intoxicant, and he appealed. The Court of Criminal Appeals affirmed. On further appeal, the Supreme Court, Drowota, J., held that: (1) "totality of the circumstances" approach should be followed in assessing accused's physical control of automobile for purposes of statute making it unlawful to be in physical control of automobile while under influence of intoxicant, and (2) defendant, who was asleep, on driver's side of vehicle parked on public road, with possession of keys, had "physical control" of vehicle for purposes of statute.

Affirmed.

1. Automobiles ⇐332

"Totality of the circumstances" approach should be used in assessing accused's physical control of automobile, for purposes of statute making it unlawful to drive or to be in physical control of automobile while under influence of intoxicant. T.C.A. §§ 55–10–401, 55–10–401(a).

2. Automobiles ⇐332

Defendant who was asleep on driver's side of vehicle parked on public road with possession of keys had "physical control" of vehicle, within meaning of statute making it unlawful to drive or be in physical control of automobile while under influence of intoxicant; defendant was alone in vehicle, no one else was in area, but for intoxication defendant had present physical ability to direct vehicle's operation and movement, and could at anytime have started engine and driven away. T.C.A. §§ 55–10–401, 55–10–401(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Automobiles ⇐332

In making it a crime to be in physical control of automobile while under influence of intoxicant, legislature intended to enable drunken driver to be apprehended before he "struck." T.C.A. §§ 55–10–401, 55–10–401(a).

Steven R. Stout, Nashville, for defendant-appellant.

Charles W. Burson, Atty. Gen. and Reporter, Merrilyn Feirman, Asst. Atty. Gen., Nashville, for plaintiff-appellee.

OPINION

DROWOTA, Justice.

The Defendant, David Lawrence, has appealed his conviction of driving while under the influence of an intoxicant, third offense, in violation of T.C.A. § 55–10–401. He was also convicted of violating the implied consent provision of T.C.A. § 55–10–406(a)(3) for refusing to submit to a blood-alcohol test. We granted the Defendant's Rule 11 Application to decide whether the evidence is sufficient to sustain his conviction under T.C.A. § 55–10–401, which makes it unlawful to "drive or to be in physical control" of an automobile while under the influence of an intoxicant.

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I.

The record reveals that during the evening hours of March 10, 1990. Deputy Sheriff Roberts of the Johnson County Sheriff's Department, received a report of a vehicle blocking Brushy Fork Road, a public, narrow gravel road maintained by Johnson County. Upon his arrival at the scene, Officer Roberts saw the Defendant's pickup truck parked "completely in the road." Officer Roberts testified that, in order to get around the Defendant's vehicle, he had to drive his patrol car into a ditch.

After exiting his patrol car, Officer Roberts approached the Defendant's vehicle and found him asleep inside the truck. The Defendant was sitting behind the steering wheel leaning towards the passenger side of the vehicle. The motor was off and the Defendant was alone in the vehicle. No other persons were in the area. The keys to the truck were in the Defendant's pocket. The officer tapped on the window and the Defendant awoke after a "minute or so." Officer Roberts smelled a strong odor of alcohol and discovered an unopened quart bottle of beer inside the truck. When the Defendant failed a field sobriety test, he was arrested for violating T.C.A. § 55–10–401. The Defendant refused to submit to a blood-alcohol test and refused to sign the refusal form. Officer Roberts, having nine years experience as a police officer, offered his opinion at trial that the Defendant was intoxicated. The Defendant did not take the stand or present any proof. No explanation was given as to why the Defendant, in an inebriated condition, was asleep in the truck or why it was parked in the roadway.

The trial court, sitting without a jury, held:

> Looking at the different elements, there's no dispute but what this is a public road, so that takes care of that element. And in my opinion, there was enough evidence to consider this man under the influence of an intoxicant to the point that it was affecting his driving, and probably had been for some time prior to that. You don't get drunk within a few minutes, even if you chug-a-lug, in my opinion. Now, the—the other element, that is—the officer didn't see him driving, but the law says driving or physical control, and that's the only [illegible] that's even close. In my opinion, I agree with [defense counsel] that the case holding where the motor is running and the lights are on and the keys are in the ignition, those are all strong—that's—that's strong evidence that the car was in physical control of the driver. In this case, we've got a defendant sitting in the driver's seat with the keys in his pocket. And it was still light. There's no point in having the lights on when it is light. I'm of the opinion that beyond a reasonable doubt, that this defendant was in physical control even though the motor was off and the keys were in his pocket.

The Court of Criminal Appeals affirmed on the basis that

> [a] deputy sheriff found the [defendant] sound asleep in his truck, parked in the middle of an unpaved, very narrow, one-lane country road. He was on the driver's side of the truck and was alone in the vehicle. He had the keys to his truck in his pocket and he was drunk at the time. He had an unopened quart bottle of beer with him, but no other open or unopened containers of alcohol. Although he refused to submit to any test for his blood alcohol content, his poor performance on a sobriety test confirmed his inebriated condition.
>
> The [defendant] presented no proof to dispute anything about which the officer testified.
>
> • • •
>
> There was ample, indeed overwhelming evidence from which any rational trier of fact would find beyond a reasonable doubt that the [defendant] violated T.C.A. § 55–10–401(a) by being in physical control of his truck upon a public highway while under the influence of an intoxicant....

On appeal to this Court, the Defendant does not challenge the facts as found below, including his intoxicated condition. Rather, he challenges the sufficiency of the evidence to support his conviction. He claims there is no proof of physical control and insufficient proof of driving.

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II.

The controlling statute, T.C.A. § 55–10–401(a) provides that "[i]t shall be unlawful for any person or persons to *drive or to be in physical control* of any automobile or any motor driven vehicle on any of the public roads and highways of the State of Tennessee, or on any streets or alleys ... or any other premises which is generally frequented by the public at large, while under the influence of any intoxicant...." (Emphasis added.) The plain language of T.C.A. § 55–10–401(a) suggests that the statute can be violated in one of two ways—by "driving" or by being in "physical control" of an automobile while intoxicated. The courts below found that the Defendant violated the statute by being in physical control.

Justice Daughtrey of this Court, while a member of the Court of Criminal Appeals, succinctly summarized our "physical control" cases in a 1988 unpublished opinion:

> [T]here are two types of situations in which a person will be found guilty of DUI by being in "physical control" of an automobile while he or she is under the influence of an intoxicant. In both of these fact patterns, the state is able to prove, either directly or circumstantially, that the defendant possessed the automobile or had the potential means of driving.
>
> The first line of cases involves the situation in which the intoxicated driver steers an inoperative automobile that is pushed from behind by either a person or another automobile. *See Hester v. State*, 196 Tenn. 680, 270 S.W.2d 321 (1954); *State v. Lane*, 673 S.W.2d 874 (Tenn. Crim.App.1983). The courts have concluded that, regardless of the source of the automobile's motion, its presence on the road constitutes a threat to all others when it is guided or operated by an intoxicated person.
>
> A second line of DUI "physical control" cases involves the situation in which the defendant is found intoxicated either in or beside the parked vehicle and the circumstantial evidence strongly indicates that the defendant drove to the location in an intoxicated condition. For example, in *State v. Farmer*, 675 S.W.2d 212 (Tenn.Crim.App.1984), the defendant was found sitting behind the wheel of his car. The keys were in the ignition, the ignition was on, but the engine was not running. The defendant admitted that he was driving the car when the tire went flat and that he had pulled over to the shoulder where the police found him. The jury rejected his contention that he was sober while driving but drank 12 or more beers after the flat occurred. Similarly, in *State v. Ford*, 725 S.W.2d 689 (Tenn.Crim.App.1986), the defendant was found asleep or passed out behind the steering wheel. The engine was still running but the car was not moving because it had struck a guardrail. In addition to being very unsteady on his feet, the defendant smelled of alcohol and several full and empty beer cans were found in his car. In *Hopson v. State*, 201 Tenn. 337, 299 S.W.2d 11 (1957), the defendant drove her car off the road and hit the side of a building. A witness observed the defendant get out of the car and testified that the defendant appeared intoxicated.
>
> In each of these cases, the defendant's automobile was stationary at the time of arrest. Nevertheless, the courts concluded that sufficient circumstantial evidence existed to show that the defendants had driven the vehicle while they were under the influence of intoxicants. *See State v. Harless*, 607 S.W.2d 492, 493 (Tenn.Crim.App.1980) (DUI may be established by circumstantial evidence). Moreover, in each case there was direct evidence ... of physical control over the vehicle.

A review of the cases cited above reveals that in order for a violation of T.C.A. § 55–10–401(a) to occur, the vehicle's engine need not be running, *Hester*, 196 Tenn. at 682–83,[1] and the vehicle need not be actually moving at the time, *Ford* at 690–91. Convictions have been sustained even

[1] "Thus it seems to us that the test is, was the person in control of his automobile in an inebriated condition, if he was, then he is guilty under the statute whether the motor of the car was running or not so long as the car was on the highway...."

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though no one saw the vehicle in motion or the accused driving. *See, e.g., Hopson* and *Farmer, supra.* This is so because "[l]ike any other crime, driving under the influence of an intoxicant can be established by circumstantial evidence." *Ford* at 691; *Harless* at 493. These general statements aside, however, Tennessee has not addressed the precise question presented here, i.e., whether an intoxicated defendant has "physical control" of a vehicle in violation of T.C.A. § 55–10–401(a) when he is asleep on the driver's side of a vehicle parked on a public road with possession of the keys.

Courts in other states construing the meaning of "physical control" in the context of intoxication statutes generally do not require that the vehicle be moving at the time in question. *See, e.g., State v. Peterson,* 236 Mont. 247, 769 P.2d 1221, 1223 (1989) (drunk defendant, who was found asleep in the driver's seat of vehicle which had run off the road, with keys to the vehicle in his pocket, was in physical control even though he was found slumped over to the right toward the passenger's seat); *State v. Ghylin,* 250 N.W.2d 252, 254 (N.D.1977) (defendant was in physical control when seen exiting vehicle in intoxicated condition); *Kansas City v. Troutner,* 544 S.W.2d 295, 300 (Mo.1976) (finding of physical control upheld where intoxicated defendant was found slumped over steering wheel while vehicle was motionless); *Hughes v. State,* 535 P.2d 1023 (Okla.1975) (intoxicated defendant found in parked vehicle behind the wheel with his head leaning towards the passenger side of the vehicle was in physical control).

Definitions of physical control itself vary:

> [N]umerous courts have defined actual physical control to mean existing or present bodily restraint, directing influence, domination or regulation of any vehicle, a definition apparently not including movement, as several of the courts applying the definition have specifically pointed out.
>
> Other definitions of actual physical control . . . include the following: actual physical control is not limited to a moving vehicle, but means either the management of the movements of the ... chinery of a motor vehicle or the ... agement of the movement of the vehi... itself; being in actual physical contr... means more than the ability to stop an automobile; it means the ability to keep from starting, to hold in subjection, to exercise directing influence over, and the like; and actual physical control requires that a person be in the driver's seat of the vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that he is physically capable of starting the engine and causing the vehicle to move.

Annotation, *What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statutes,* 93 A.L.R.3d 7, 18 (1979). Although being in "physical control" does not require that the vehicle be in motion, "driving" generally does. 93 A.L.R.3d at 15 ("Many courts have stated that driving [as distinguished from physical control] requires that the vehicle be in motion in order for the offense of drunk driving to be committed."). *But see, State v. Sweeney,* 77 N.J.Super. 512, 187 A.2d 39 (1962) (a person "drives" when he enters a stationary vehicle, turns on the ignition, starts and maintains the motor in operation, and remains in the driver's seat with the intent to move the vehicle).

The Alabama Supreme Court, in *Cagle v. City of Gadsden,* 495 So.2d 1144 (Ala. 1986), adopted a practical approach to determining whether an intoxicated driver of a vehicle has physical control of it. Prior to *Cagle,* physical control was defined in Alabama as the "exclusive physical power, and present ability, to operate, move, park, or direct whatever use or non-use is to be made of the motor vehicle at the moment." *Id.* at 1145. The test was (1) whether the Defendant had actual or constructive possession of the vehicle's ignition key or, alternatively, proof was presented that a key was not needed to operate the vehicle, (2) the Defendant was found behind the wheel and, but for the intoxication, physically capable of starting the engine and causing the vehicle to move and, (3) the vehicle was operable to some extent. *Id.*

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The Supreme Court of Alabama in *Cagle* held that the three-part test above was too restrictive because it would be impossible to obtain a conviction of an intoxicated driver if he simply tossed the keys out the window or slid over to the passenger side of the vehicle upon seeing an approaching officer. *Id.* "In both of these hypothetical situations the result reached is untenable, especially in light of the strong policy behind legislative and judicial efforts to eliminate the drinking driver from [the] highways." *Id.* at 1146. Accordingly, the Court abandoned the three-part test and adopted a "totality of the circumstances" approach for determining physical control. The Court noted that the factors comprising the three-part test would still be relevant, but not dispositive in all cases, and any other factors presented by the proof could be considered as well. *Id.* at 1147.

III.

[1] We are persuaded that the totality of the circumstances approach in assessing the accused's physical control of an automobile for purposes of T.C.A. § 55–10–401(a) should be followed in Tennessee. This method is neither so restrictive so as to thwart the obvious statutory aim of enabling the drunken driver to be apprehended before he maims or kills himself or someone else, nor is it so expansive as to permit a conviction where clearly not warranted, i.e., an intoxicated person sitting in the driver's seat of an automobile having no tires and mounted on blocks. Thus, when the issue is the extent of the accused's activity necessary to constitute physical control, as in the instant case, the test allows the trier of fact to take into account *all* circumstances, i.e., the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability, but for his intoxication, to direct the use or non-use of the vehicle, or the extent to which the vehicle itself is capable of being operated or moved under its own power or otherwise. The same considerations can be used as circumstantial evidence that the defendant had been *driving* the vehicle.

[2, 3] Applying the totality of the circumstances approach, we hold that the Defendant in the case at bar was in physical control of his automobile within the meaning of T.C.A. § 55–10–401(a). The Defendant was inside of the vehicle, behind the wheel, and had possession of the keys. He was alone in the truck and no one else was in the area. The record is undisputed that, but for his intoxication, he had the present physical ability to direct the vehicle's operation and movement. The Defendant could have at any time started the engine and driven away. From a mechanical standpoint, the vehicle was capable of being immediately placed in motion to become a menace to the public and to its drunken operator. It is our opinion that the Legislature, in making it a crime to be in physical control of an automobile while under the influence of an intoxicant, "intended to enable the drunken driver to be apprehended before he strikes." *See Hughes*, 535 P.2d at 1024.[2] We agree with the observation that "[a] motor vehicle is recognized in the law as a dangerous instrumentality when in the control of a sober person; in the control of a drunk, the dangerous instrumentality becomes lethal. Therefore ... the court [should interpret] the drunk driving statute in a way that [keeps] drunks from behind the steering wheels of motor vehicles, even when the drunk need[s] to 'sleep it off.'" *Stevenson v. City of Falls Church*, 243 Va. 434, 416 S.E.2d 435 (1992) (Compton, Carrico, and Hassell, JJ, dissenting). The fact that the Defendant chose to park his vehicle on a country road and sleep off the effects of the alcohol is immaterial. The road where

2. *Hughes* involved an intoxicated driver sleeping behind the wheel. The Oklahoma court noted that, "[w]e believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had physical control...." *Hughes* at 1024.

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the Defendant was located was a public road and we believe the "better policy is that a person should ascertain his ability to drive *before* climbing behind the wheel and terrorizing the roadways of this state." (Emphasis in original.) *Peterson*, 769 P.2d at 1224.

It bears noting that the Defendant could probably have been convicted of "driving," the alternative way of violating T.C.A. § 55–10–401. Although no one actually saw the Defendant driving his vehicle, the evidence amply supports the conclusion that he did so. From the undisputed facts in the record, the inference may reasonably be made that the Defendant drove his vehicle while under the influence of an intoxicant. The Defendant "must have driven [his vehicle] on the road to the point where it was found; in the absence of anything to suggest that this might have been done by someone else, it is reasonable to infer that it was done by [the Defendant]." *Farmer v. State*, 208 Tenn. 75, 343 S.W.2d 895, 897 (1961). However, as stated earlier, the courts below found only that the Defendant was in physical control of his vehicle.

Finally, the Defendant's argument that there is a material variance between the indictment and the proof is without merit. The indictment specifically charges a violation of T.C.A. § 55–10–401 and contains sufficient information to put the Defendant on notice of the State's theory against him and the facts to be proven at trial. *See State v. Estes*, 199 Tenn. 406, 287 S.W.2d 40–42 (1956).

The judgment of the courts below are affirmed. Costs are taxed against the Defendant.

REID, C.J., and O'BRIEN, DAUGHTREY and ANDERSON, JJ., concur.

In re Eugene Ray WALKER.

Supreme Court of Tennessee, at Knoxville.

March 1, 1993.

Testator's former wife brought action as next friend of her minor children stating claim to estate. The Chancery Court, Knox County, Frederick D. McDonald, Chancellor, dismissed wife's claim and wife appealed. The Court of Appeals affirmed and wife appealed. The Supreme Court, Reid, C.J., held that estate passed in fee simple to testator's heirs and therefore wife's children took no interest in estate.

Affirmed.

1. Wills ⇐439, 442

The cardinal rule for interpreting and construing will is ascertainment of intent of testator; that intent, when known, will be in effect unless prohibited by some rule of law or public policy.

2. Wills ⇐478

For testator's will to be given effect based on testator's intent, there must be some evidence of that intent, not mere surmise as to the testator's intention.

3. Wills ⇐686(1)

Will devising all property constituting decedent's estate in trust for wife, which made no provision for termination of trust or disposition of property upon death of wife, was for wife's life only.

4. Wills ⇐599

Presumption against intestacy was not sufficient to convert life estate into fee simple. T.C.A. § 32–3–101.

5. Wills ⇐449

Common-law presumption against partial intestacy is applicable where words used, by any fair interpretation, will embrace property not otherwise devised, unless contrary intention appears from context. T.C.A. § 32–3–101.

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